UNITED STATES COURT OF INTERNATIONAL TRADE REPORTS

VOLUME 6

CASES ADJUDGED IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

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UNITED STATES COURT OF INTERNATIONAL TRADE

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DECISIONS OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

570 F. Supp. 734

The Florsheim Shoe Company, Division of Interco, Inc., plaintiff *v.* United States, defendant

Court No. 82-4-00484

Before **Bernard Newman**, *Judge*.

On Defendant's Motion To Dismiss

[Defendant's motion granted.]

(Dated July 7, 1983)

Baker & McKenzie (*William D. Outman, II* and *Munford Page Hall, II*, Esqs., of counsel) for the plaintiff.

J. Paul McGrath, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, and *Michael P. Maxwell, Esq.*), for the defendant.

Bernard Newman, *Judge*:

Introduction

This case presents several questions arising out of Presidential action taken under the Generalized System of Preferences ("GSP"), a vitally important international trade program. By Title V of the Trade Act of 1974 (88 Stat. 2066–2071, Pub. L. 93-618, 19 U.S.C. § 2461 *et seq.*) Congress created the GSP which authorizes the President to provide duty-free treatment for any eligible article imported from any beneficiary developing country for the purpose of furthering the economic development of such country. Section 501 of the Trade Act of 1974 (19 U.S.C. § 2461).[1] In this connection, India has been designated by the President as a beneficiary developing country for purposes of Title V of the Trade Act of 1974 (see section 502 (19 U.S.C. § 2462)). It should also be mentioned at this juncture that under section 504 (19 U.S.C. § 2464)—the centerpiece of this litigation—the President may, or under certain circumstances must, deny duty-free treatment under the GSP.

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[1] Hereinafter, all cited section numbers refer to Title V of the Trade Act of 1974. See also Headnote 3(c) of the General Headnotes and Rules of Interpretation, Tariff Schedules of the United States.

BACKGROUND

On January 24, 1977, the President placed buffalo leather on the list of articles eligible for duty-free treatment under the GSP (Executive Order No. 11960, 42 FR 4317). Shortly thereafter, on February 28, 1977, buffalo leather imported from India was excluded from duty-free treatment (Executive Order No. 11974, 42 FR 11230A). On March 28, 1980, goat and kid leather, not fancy, were added to the list of GSP eligible articles, but imports of such articles from India were excluded from duty-free entry by Executive Order No. 12204, 45 FR 20740. The latter Order also continued the denial of duty-free treatment for imports of buffalo leather from India. Finally, by Executive Order No. 12302 of April 2, 1981 (46 FR 19901), the President continued the denial of duty-free treatment for imports of buffalo leather and goat and kid leather, not fancy, from India.

Florsheim, a domestic manufacturer of footwear, imports buffalo leather and goat and kid leather, not fancy, from India for use in its products. In 1979, Florsheim filed a petition with the United States Trade Representative ("USTR") requesting a separate category in the Tariff Schedules of the United States ("TSUS") for water buffalo leather, and asking for the duty-free treatment of such leather from India under the GSP as allegedly no like or directly competitive article was produced in the United States on January 3, 1975, the effective date of the Trade Act of 1974. By letter dated July 11, 1980, the USTR denied the petition since the USTR had determined that an article directly competitive with water buffalo leather was produced in the United States as of January 3, 1975.[2]

In 1980, Florsheim filed another petition with the USTR requesting duty-free treatment for water buffalo leather and also for goat and kid leather, not fancy, as allegedly no like or directly competitive article was produced in the United States on January 3, 1975. The second petition was denied on June 11, 1981 because the USTR found that there was domestic production of goat and kid leather, and that water buffalo leather, while not produced domestically, is directly competitive with calf leather.

Having been unsuccessful in its petitions at the administrative level to obtain duty-free treatment under the GSP for water buffalo leather and for goat and kid leather, not fancy, Florsheim commenced this action on April 19, 1982 (covering 122 entries) to review the denial of its protests by the United States Customs Service against the classification of buffalo leather and goat and kid leather, not fancy, imported from India as dutiable merchandise under items 121.55 and 121.62, TSUS. Plaintiff claims that the subject merchandise should have been classified as duty-free under items A121.55 and A121.62, TSUS.

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[2] See 15 CFR Part 2007 *et seq.*

There is no dispute that this Court has subject matter jurisdiction under 28 U.S.C. § 1581(a).

It is evident from the complaint that plaintiff's grievance lies in the President's Executive Orders denying the subject merchandise duty-free treatment under the GSP. The gravamen of the complaint is that the President's action was predicated upon section 504(c)(1)(B) (19 U.S.C. § 2464(c)(1)(B)), which in essence requires the President to deny duty-free treatment for GSP eligible articles imported from a beneficiary developing country if more than 50 percent of the appraised value of the total United States imports of such article during any calendar year are exported from that country. The President must deny duty-free treatment respecting imported articles which meet this "competitive need formula", unless he makes certain additional findings specified by the statute. However, the competitive need limitation specified in section 504(c)(1)(B) "does not apply" to imported articles if "no like or directly competitive article" was produced in the United States on January 3, 1975. Section 504(d).

In substance, plaintiff alleges that the President's action was *ultra vires* in denying duty-free treatment to the subject merchandise under the competitive need formula on the ground that the USTR erroneously determined under section 504(d) (based upon alleged faulty fact-finding by the ITC) that articles like or directly competitive with the importations were produced in the United States on January 3, 1975. Plaintiff contends, therefore, that in taking action under section 504(c)(1)(B) the President failed to comply with section 504(d), and hence Customs incorrectly classified the imported buffalo leather and the goat and kid leather as dutiable articles under items 121.55 and 121.62, TSUS. As previously mentioned, planitiff seeks to have the entries reliquidated duty-free under items A121.55 and A121.62, TSUS.

Presently before us is defendant's motion pursuant to Rule 12(b)(5) of this Court's rules to dismiss the action for failure to state a claim upon which relief can be granted. Defendant's motion is based upon three grounds:

(1) Florsheim lacks standing to seek review of the Presidential action challenged by the complaint;

(2) The President acted within his delegated authority under section 504 in denying duty-free treatment to the merchandise in question; and

(3) The President's action was not subject to judicial review, except to insure conformity with the President's delegated authority and compliance with the procedural prerequisites to taking action.

STANDING

Defendant's contention that plaintiff lacks standing to bring this action may be quickly disposed of. On this aspect of the case, defendant posits that Florsheim's claim is based on sections 504(c)(1)(B) and 504(d), and that Florsheim is not within the "zone of interests" protected by those provisions. On that score, defendant insists that only domestic companies which produce goods competitive with the imported articles are protected by sections 504(c)(1)(B) and 504(d), and hence only such domestic companies that seek to compel the President to withdraw duty-free treatment under the competitive need formula (section 504(c)(1)(B)) could conceivably have standing to bring an action.[3] Defendant further relies upon the broad delegation of authority to the President under section 504(a) to withdraw, suspend, or limit duty-free treatment under the GSP as indicative that "Congress does not intend to protect entities aggrieved by loss of duty-free treatment" (Defendant's memorandum, at 10).

In support of its standing to bring the instant action, plaintiff relies primarily upon 28 U.S.C. § 2631(a), which reads:

> § 2631. *Persons entitled to commence a civil action.*
>
> (a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protet pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

I have concluded that plaintiff, the importer and ultimate consignee of the goods in question, whose protests against the duty assessments on the importations were denied by Customs under section 515 of the Tariff Act of 1930 (19 U.S.C. § 1515), has statutory standing to contest such denial under section 2631(a). Clearly, Florsheim has standing to claim entitlement to duty-free treatment of its importations under the GSP and challenge the classification and assessment of duties by Customs.

The instant case is readily distinguishable from *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied,* 404 U.S. 1004 (1971), relied upon by defendant, wherein *consumers* sought to bring an action for alleged violations of the Lanham Act grounded on false descriptions or representations, and the Court, not surprisingly, determined that the statute conferred standing only on commercial entities.

The short of the matter is that I disagree with defendant's contention that the "zone of interests" test bars this plaintiff from seeking judicial review of the claim that its imported merchandise was erroneously assessed with duties. Accordingly, defendant's motion to dismiss on the ground that plaintiff lacks standing in this action is denied.

---

[3] Defendant, however, does not concede that even domestic companies are entitled to judicial review of the President's action under section 504.

PRESIDENT'S AUTHORITY UNDER SECTION 504

We reach plaintiff's contention that the President's action in this case was *ultra vires.*

The gist of Florsheim's complaint is that the President improperly denied duty-free treatment to the subject merchandise under the competitive need formula of section 504(c)(1)(B) because the USTR erred in his determination under section 504(d) that articles like or directly competitive with the imported merchandise were produced in the United States on January 3, 1975.[4] Thus, according to plaintiff, by an erroneous determination under section 504(d) the President acted illegally under section 504(c)(1)(B). Defendant, however, stresses the President's broad discretionary authority to deny the application of duty-free treatment under section 504(a), which we now address.

The pertinent statutory provisions read:

> § 2464. *Limitation on preferential treatment.*
>
> (a) *Withdrawal, suspension, or limitation of duty-free treatment.* The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 501 [19 USC § 2461] with respect to any article or with respect to any country; except that no rate of duty may be established in respect of any article pursuant to this section other than the rate which would apply but for this title [19 USC §§ 2461 et seq.; amendment to 19 USC § 1202]. In taking any action under this subsection, the President shall consider the factors set forth in sections 501 and 502(c) [19 USC §§ 2461 and 2462(c)].
>
> * * * * * * *
>
> (c) *Designation, continuance of designation, or redesignation as beneficiary developing country notwithstanding increases in exports to United States.* (1) Whenever the President determines that any country—
>
> * * * * * * *
>
> (B) except as provided in subsection (d), has exported (either directly or indirectly) to the United States a quantity of any eligible article equal to or exceeding 50 percent of the appraised value of the total imports of such article into the United States during any calendar year,
>
> then, not later than 60 days after the close of such calendar year, such country shall not be treated as a beneficiary developing country with respect to such article, except that, if before such 60th day, the President determines and publishes in the Federal Register that, with respect to such country—
>
> (i) there has been an historical preferential trade relationship between the United States and such country,

---

[4] The USTR was delegated authority by the President for the administration of the GSP. Executive Order No. 11846, 40 FR 14294A (1975).

> (ii) there is a treaty or trade agreement in force covering economic relations between such country and the United States, and
>
> (iii) such country does not discriminate against, or impose unjustifiable or unreasonable barriers to, United States Commerce,
>
> then he may designate, or continue the designation of, such country as a beneficiary developing country with respect to such article.
>
> * * * * * * *
>
> (d) *Domestic non-production of like or directly competitive articles.* Subsection (c)(1)(B) does not apply with respect to any eligible article if a like or directly competitive article is not produced on the date of enactment of this Act [enacted Jan. 3, 1975] in the United States.

While the complaint alleges that duty-free treatment of the subject merchandise was denied pursuant to section 504(c)(1)(B) (the competitive need formula), plaintiff does not allege that such section was the *sole* basis for the President's action. In point of fact, Executive Order No. 12302, issued on April 1, 1981 (prior to the date of entry of any of the 122 entries that are the subject of this action) specifically cites section 504(a) as well as section 504(c) as authority for the President's action. Thus, the Executive Order reads, in pertinent part:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Title V of the Trade Act of 1974 (88 Stat. 2066, 19 U.S.C. 2461 *et seq.*) as amended * * * and as President of the United States of America, in order to modify, *as provided by Sections 504 (a) and (c) of the Trade Act of 1974* (88 Stat. 2070, 19 U.S.C. *2464 (a) and (c)),* the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries * * * [Italic added.]

The fact that the President acted under section 504(c)(1)(B), as alleged in the complaint, does not preclude the President's exercise of his power to deny duty-free entry to the subject merchandise in pursuance of his authority under section 504(a). It is well established that Presidential action may be grounded upon alternative statutory authorities. See, *e.g., United States Cane Sugar Refiners' Association* v. *Block, Secretary of Agriculture,* 69 CCPA 172, 683 F.2d 399 (1982), *aff'g* 3 CIT 196, 544 F. Supp. 883 (1982); and *Aimcee Wholesale Corp.* v. *United States,* 60 CCPA 1, C.A.D. 1070, 468 F.2d 202 (1972), *aff'g* 66 Cust. Ct. 155, C.D. 4186, 324 F. Supp. 514 (1971). *Cf. United States* v. *Yoshida International, Inc.,* 63 CCPA 15, C.A.D. 1160, 526 F.2d 560 (1975).

With respect to defendant's contention that section 504(a) serves as further authority for the validity of Executive Order No. 12302, plaintiff submits that no consideration should be given to section

504(a) inasmuch as the complaint makes no mention of that section. To sustain plaintiff's contention would be to place an unwarranted limitation upon judicial review. Again, it is emphasized that Executive Order 12302 does not designate section 504(c)(1)(B) as the sole source of authority. Accordingly, this Court has considered the argument presented by defendant with respect to the authority delegated to the President under section 504(a).

Section 504(a) explicitly grants to the President plenary authority to withdraw, suspend, or limit duty-free treatment under the GSP after consideration of certain factors listed under sections 501 and 502(c). By the use of the term "may" in section 504(a), Congress indicated its permission and the broad discretion conferred to take the indicated actions. *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

While under section 504(a) the President possesses broad discretion to deny duty-free treatment under the GSP, by contrast whenever the President determines under 504(c)(1)(B) that imports meet the competitive need formula, he must deny duty-free treatment unless he makes the alternative findings required by section 504(c)(1)(B) (i), (ii) and (iii). However, section 504(c)(1)(B) neither adds to nor diminishes the President's discretion under section 504(a) to deny duty-free treatment to imported goods, but rather section 504(c)(1)(B) limits the President's authority only in that he must withdraw duty-free treatment under the conditions stated. See Senate Rep. No. 93-1298, 93d Cong., 2d Sess., *reprinted in* U.S. Code, Cong. & Ad. News (1974), p. 7357; Senate Rep. No. 96-249, 96th Cong., 1st Sess., *reprinted in* U.S. Code, Cong. & Ad. News (1979), p. 657.

The purpose of section 504(d) is simply to qualify the President's mandate to withhold duty-free treatment in accordance with the competitive need limitation specified in section 504(c)(1)(B). This purpose is manifest from the text of section 504(c)(1)(B), "except as provided in subsection (d)". Thus, it is clear that section 504(d) is designed merely to qualify the application of the competitive need formula prescribed by section 504(c)(1)(B).

The legislative history of section 504(d) confirms that the provision was intended only to exempt articles from the mandatory withdrawal of duty-free treatment under section 504(c)(1)(B), and not to preclude the exercise of the President's discretion to withdraw, suspend, or limit such treatment under section 504(a). On that score, Senate Rep. No. 93-1298 at 7217, *supra*, states:

> 9. *Products not produced in the United States.*—The Committee bill would *exempt* any product from the 50-percent-of-total-imports ceiling in Title V of the bill where there is no directly competitive article produced in the United States. Thus, even if a product from a particular developing country represents more than 50 percent of total U.S. imports of that product in any one calendar year, it *would still be eligible* for duty-free

> treatment under Title V of the bill if there were no directly competitive article produced in the United States. Under certain circumstances, the President could waive the 50 percent or $25 million ceiling. [Italic added.]

As can be seen from the portion of the Senate Report quoted *supra*, section 504(d) merely provides that the article "would still be eligible" for duty-free treatment, and does not grant a *right* to such treatment.

Plaintiff, relying upon a literal reading of section 504(a), insists that this section does not authorize the President to withdraw duty-free treatment respecting a *particular* article imported from a *particular* country, and that such action is authorized only by section 504(c)(1)(B). In this connection, plaintiff maintains that under section 504(a), the President may delete *a country* from the list of beneficiary developing nations, *or* he may withdraw *an article* from the list of eligible articles. As correctly observed by plaintiff, in the present case the President neither deleted India from the list of beneficiary nations, nor did he withdraw either buffalo leather or goat and kid leather, not fancy, from the list of eligible articles.

I am unable to agree with plaintiff's narrow reading of the President's authority under section 504(a). This section provides that "the President may withdraw, suspend, or *limit* the application of the duty-free treatment * * * with respect to any article or with respect to any country". (Italic added.) I agree with defendant's contention that in this case the President "limited" the duty-free treatment of the subject merchandise. Further, I must agree with defendant that the only method by which the President can "limit" the application of duty-free treatment respecting an article is by limiting the countries to which duty-free treatment for that article is granted; and conversely, the only way to "limit" the application of duty-free treatment respecting a particular country, is to limit the duty-free articles from that country. This interpretation accords appropriate significance to the term "limit" in the statute, and reflects what I believe was the Congressional intent to grant the President broad discretion in the administration of the GSP.

In sum, the President's action in limiting the application of duty-free treatment concerning the subject merchandise was within the President's delegated authority under section 504(a).

Plaintiff also challenges defendant's broad construction of the President's authority under section 504(a) as an unconstitutional delegation of legislative authority, following the rationale of *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928). I disagree.

In *Hampton*, which involved Presidential power to increase or decrease duties under the Tariff Act of 1922, the Supreme Court said, through Chief Justice Taft (276 U.S. at 409):

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the applica-

> tion of the congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

In making findings of fact and implementing the provisions of section 504 by executive orders, the President acts merely as an agent of Congress in effectuating a legislative policy relating to an exclusively legislative function in determining the dutiability of imported goods.

Counsel for plaintiff concedes that "Presidential acts are not unconstitutional if the delegated legislative authority has guidelines for its exercise" (Plaintiff's memorandum, at 39). As a precondition to taking action under section 504(a), the statute mandates that the President *shall* consider the factors set forth in sections 501 and 502(c) of Title V (19 U.S.C. §§ 2461 and 2462(c)).[5] Plainly, then, Congress has provided the President with adequate standards for the exercise of his authority under section 504(a). Moreover, after prescribing the pertinent factors, the President's authority is circumscribed: Under section 504(a), rates of duty may not be adjusted, nor may the President impose quantitative limitations; the President may only withdraw, suspend, or limit the application of duty-free treatment. Importantly, too, Congress has required Presidential reporting under section 505.

An additional factor bearing upon the delegation question is that in exercising his authority under section 504(a) the President is necessarily confronted with weighty considerations of foreign relations with the developing nations as well as the economic and commercial objectives of the GSP. Obviously, a statute giving the President substantial discretion with respect to the withdrawal, suspension, or limitation of duty-free treatment of importations from a beneficiary developing country can normally be expected to have wide-ranging foreign relations implications as well as domestic economic and political repercussions. The foreign affairs component of the President's delegated authority under section 504(a) implicates a vitally broad grant of executive authority in an area left by Congress to the President's judgment. In this vein, Judge Davis of the United States Court of Claims,[6] pointedly observed in *South Puerto Rico Sugar Co. Trad. Corp.* v. *United States*, 334 F.2d 622, 167 Ct. Cl. 236 (1964), *cert. denied*, 379 U.S. 964 (1965).

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[5] 19 U.S.C. § 2461 provides:

The President may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this title [19 U.S.C. §§ 2461 et seq.; amendments to 19 U.S.C. § 1202]. *In taking any such action, the President shall have due regard for—*

(1) The effect such action will have on furthering the economic development of developing countries;

(2) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries; and

(3) The anticipated impact of such action on United States producers of like or directly competitive products.

19 U.S.C. § 2462(c) provides:

(c) *Factors determinative of whether to designate country as beneficiary developing country.* In determining whether to designate any country a beneficiary developing country under this section, *the President shall take into account—*

(1) An expression by such country of its desire to be so designated;

(2) The level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) Whether or not the other major developed countries are extending generalized preferential tariff treatment to such country; and

(4) The extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country. [Italic added.]

> The presence of foreign factors adds still more to the range of the powers transmitted by the phrase because, as the Supreme Court has explicitly recognized, a delegation of unusually extensive discretion to the President is not uncommon in the external realm. "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." [Citations omitted.] In the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy. Accordingly, when Congress uses far-reaching words in delegating authority to the President in the area of foreign relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. *In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should not be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders.* [Footnote omitted.] [Italic added.]

See also: *Star-Kist Foods, Inc.* v. *United States*, 47 CCPA 52, C.A.D. 728, 275 F.2d 472 (1959), and cases discussed therein.

In light of the statutory framework considered above, and taking cognizance of the longstanding judicial approval of broad grants of authority to the President in the sphere of foreign relations and commerce, I am not persuaded to give section 504(a) the narrow construction urged by plaintiff. *Cf. FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 558-60 (1976).

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[6] Now a Circuit Judge of the United States Court of Appeals for the Federal Circuit.

REVIEWABILITY OF PRESIDENTIAL DISCRETIONARY ACTION AND FACT FINDING

We now turn to defendant's contention that neither the President's exercise of discretion under section 504(a) nor his findings of fact under sections 504(c)(1)(B) and 504(d) are within the permissible scope of judicial review. I consider the scope of the Court's review to be the core issue raised herein. This issue is of transcendent importance given the President's key role in the implementation of the legislative policy underlying many of our international trade statutes.

I

Initially, we discuss the limitations on judicial review of the President's action taken under section 504(a). As we have seen, under that provision Congress has delegated to the President broad discretionary authority, essentially legislative in nature, to withdraw, suspend, or limit the application of duty-free treatment under the GSP, after consideration of the factors specified in sections 501 and 502(c).

The President's action under section 504(a) in withdrawing, suspending, or limiting the application of duty-free treatment under the GSP is "[i]n substance and to a great extent in form * * * but one stage of the legislative process". *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 379 (1940). It is now well established by a long line of authorities that the exercise of broad discretionary authority delegated by Congress to the President in the sphere of international trade, where the President is acting essentially as an agent of Congress, is reviewable by the Courts only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conformed with procedural requirements (if any).[7] Neither the President's findings of fact nor his motivations may be inquired into by the judiciary. *United States* v. *George S. Bush & Co., supra; Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); *United States Cane Sugar Refiners' Association* v. *Block, Secretary of Agriculture, supra; United States* v. *Yoshida International, Inc., supra; Aimcee Wholesale Corp.* v. *United States, supra; United States* v. *Star Industries, Inc.*, 59 CCPA 159, C.A.D. 1060, 462 F.2d 557 (1972), *cert. denied*, 409 U.S. 1076 (1973); *United States* v. *Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751 (1960); *Farr Mann & Co.* v. *United States*, 4 CIT 55 (1982); *Falcon Sales Company, et al.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, 199 F. Supp. 97 (1961); and *Independent Gasoline Marketers Council* v. *Duncan*, 492 F. Supp. 614 (D.D.C. 1980).

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[7] I am mindful, of course, of the recent decision by my learned colleague, Judge Carman, in *Maple Leaf Fish Co.* v. *United States*, 5 CIT 275 (1983). To the extent that *Maple Leaf* holds that the Court has jurisdiction of the action under 28 U.S.C. § 1581(a), and may determine whether the administrative action conformed with procedural requirements, I agree with Judge Carman's opinion.

As concluded above, based upon this Court's construction of the statute, the President's *limitation* on the application of duty-free entry regarding the subject merchandise was within his delegated authority under section 504(a).

Concerning review of the Executive's findings and exercise of discretion as an agent of Congress, the following observations of the Appellate Term of the former Customs Court in *Ellis K. Orlowitz Co.* v. *United States*, 47 Cust. Ct. 583, 585, A.R.D. 136, 200 F. Supp. 302, 305 (1961), *aff'd* 50 CCPA 36, C.A.D. 816 (1963), are pertinent:

> Congress can, and often does, delegate to the President, or other executive officer or agency, authority to make findings in prescribed situations, and, on the basis of such findings, to promulgate orders. This is a permissible delegation of legislative authority to the executive branch of our Government. It is axiomatic that courts are not to review the discretion exercised by the President, or other executive officer or agency, in arriving at findings in such matters. Citation of authority is not necessary to support this well-recognized rule, requiring judicial noninterference in legislative authority constitutionally conferred by Congress on the executive.

Moreover, in exercising his discretion under section 504(a), the President is mandated to consider the several interactional and somewhat subjective factors specified in sections 501 and 502(c).[8] These factors involve "a multifaceted judgmental decision" in matters of international and domestic economics and foreign relations. *Montgomery Ward & Co.* v. *Zenith Corp.*, 69 CCPA 96, 673 F.2d 1254. 1262, *cert. denied*, 103 S. Ct. 256 (1982). Consequently, respecting discretionary action under section 504(a), there is "no law to apply" for a reviewing court. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); *Montgomery Ward & Co.* v. *Zenith Corp., supra*, 673 F.2d at 1262. As aptly stated by Judge Nies, writing for our Appellate Court in *Montgomery Ward* (673 F.2d at 1261):

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> With respect to discretionary acts of the Executive, * * * the extent of permissible judicial review, varies with the statutory grant to the Executive. [Footnote omitted.] In summary, if action is committed by law to the discretion of the Executive, no review is permitted. If action is committed by law to discretion but procedural requirements are imposed, the satisfaction of procedural requirements, but only these, may be judicially reviewed. If an action is discretionary but there is law from which a court may determine that the exercise of discretion is arbitrary, capricious, or not in accordance with law, the decision itself may be reviewed on that limited basis.

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[8] See footnote 5.

In addition to stressing the Court's narrow scope of review where the President has been delegated discretionary authority to act as an agent of Congress, defendant also correctly urges the constraint upon judicial review of the factual findings upon which the President (or his delegate) relied in taking the statutorily prescribed legislative action. Specifically, plaintiff challenges the President's action taken under the competitive need formula in section 504(c)(1)(B) alleging an erroneous finding as to a like or directly competitive article under section 504(d).[9] Significantly, however, regarding section 504(d), the complaint does not allege any procedural noncompliance nor any specific misconstruction of the statutory language in section 504(c)(1)(B) or section 504(d). Rather, it is clear from the complaint and plaintiff's brief that plaintiff's grievance lies solely in the factual findings and determinations of the President and his delegate (the USTR) under 504(d), *viz,* that articles like or directly competitive with the imported articles were produced in the United States on January 3, 1975.[10] On that aspect of the case, plaintiff seeks *de novo* review under 28 U.S.C. § 2640; [11] or alternatively that this Court should review the involvement of the administrative agencies (*viz,* the USTR and the ITC) to determine whether their action was arbitrary, capricious, or otherwise not in accordance with law. Assuming, as we must, for purposes of defendant's motion to dismiss, that the factual allegations of the complaint are accepted as true, the question is whether the permissible scope of review in this action encompasses the factual foundation for the President's action.

Central to the question of the permissible scope of review of the President's factual findings based upon an investigation by the ITC is the teaching of the United States Supreme Court in the landmark decision in *United States* v. *George S. Bush & Co., supra,* 310 U.S. at 379-80, wherein Justice Douglas writing for the Court commented:

> The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for

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[9] Thus plaintiff is not challenging the determination of the President that the competitive need limitation was, in fact, exceeded; instead, plaintiff wishes to establish that notwithstanding that excess, there was, in point of fact, no like or directly competitive article produced in the United States on January 3, 1975 within the meaning of section 504(d); and that consequently, the President's action under section 504(c)(1)(B) was *ultra vires.* Plaintiff maintains that the President's action "resulted from reliance on inadequate or erroneous, decision making or *fact finding* by the administrative agencies such as the USTR or ITC" (Plaintiff's memorandum, at 42, italic added).

[10] Since section 504(c)(1)(B), reads "except as provided in subsection (d)", a finding of fact under subsection (d) is subsumed by the application of the competitive need formula. Moreover, a finding of fact under subsection (d) respecting a like or directly competitive article is implicit in action taken under section 504(c)(1)(B) based upon the qualifying language in subsection (d). Presumptively, the President makes all the necessary findings of fact that are a condition precedent to his exercise of delegated authority. However, the President is not required to recite in his order the fact that he has made the requisite findings or the findings themselves. *Aimcee Wholesale Corp.* v. *United States,* 60 CCPA 1, C.A.D. 1070, 468 F. 2d 202 (1972).

[11] That provision reads:

"§ 2640. *Scope and standard of review*

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

> well over a century. See *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 308 *et. seq.*, for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. *It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated.* In substance and to a great extent in form (*Norwegian Nitrogen Products Co.* v. *United States, supra*) the action of the Commission and the President is but one stage of the legislative process. *Hampton & Co.* v. *United States,* 276 U.S. 394. "No one has a legal right to the maintenance of an existing rate of duty." *Norwegian Nitrogen Products Co.* v. *United States, supra,* p. 318. And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this scheme than if Congress itself has exercised that judgment. *It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.* [Citations omitted.]

Continuing, the Supreme Court held:

> *For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress or those to whom it delegates authority, to determine what tariffs shall be imposed.* Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged. [Italic added.]

Citing and following *Bush,* Chief Judge Markey, writing for the Court of Customs and Patent Appeals (now the United States Court of Appeals for the Federal Circuit), cogently stated, in sustaining the validity of a Presidential Proclamation imposing quotas on the importation of sugar:

> The President's action being authorized by the statute on which he relied, his motives, his reasoning, *his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny. United States* v. *George S. Bush & Co., Inc.,* 310 U.S. 371 (1939). Beyond the truism that an action may be multi-purposed, and the distinction between the proclamation that is in issue and the press release that is not, Association's concentration on what it insists was the President's real purpose is simply irrelevant. Grist it may be for the executive or legislative mills; grist it cannot be for the mills of the judicial

> branch. *In sum, let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end.* [Footnote omitted.] [*United States Cane Sugar Refiners' Association,* 683 F.2d at 404.] [Italic added.]

Further, in *Best Foods, Inc.* v. *United States,* 39 Cust. Ct. 305, C.D. 1945 (1957), *aff'd* 42 Cust. Ct. 310, Abst. 62865 (1965), *aff'd* 47 CCPA 163, C.A.D. 751 (1960), the limitation on judicial review of Presidential action predicated upon Commission findings was put in the following way (39 Cust. Ct. at 307, 309, and 314):

> Clearly we may not, as defendant rightly argues, "review" Tariff Commission proceedings, in the sense of either affirming or reversing such proceedings. We may not go behind the findings of the Tariff Commission, nor may we challenge the discretion of the President in his decision based on such findings. We do not presume to do any of these things.
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> * * * * * * *
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> As previously observed, we do not have jurisdiction to review either the President's findings or fact, or his discretion, or the proceedings of the Tariff Commission.
>
> * * * * * * *
>
> We do not review the findings of the Commission or of the President. We do not review the Presidential discretionary determination of action to be taken. *We review only the issue as to whether the action taken, pursuant to a certain procedure is action within the statutory delegation of legislative authority to be exercised pursuant to that procedure.* [Italic added.]

See also *T. M. Duche & Sons, Inc.* v. *United States,* 36 CCPA 19, C.A.D. 391 (1948), *cert. denied,* 336 U.S. 931 (1949).

Plaintiff's attempt in the present case to obtain review of the factual basis upon which the President's action was taken would unavoidably involve an impermissible inquiry by the Courts into the President's decision-making process and into the existence of the facts calling for the exercise of his delegated authority. The above-cited precedents concerning the scope of review of Presidential action taken as an agent of Congress in conformance with delegated legislative authority are plainly at variance with the plaintiff's contentions. Patently, this Court is not authorized to "chart a new course in jurisprudence in a field in which precedents have been established by the Supreme Court." *Star-Kist Foods, Inc.* v. *United States,* 47 CCPA at 55. Accordingly, plaintiff's contention that this Court should undertake *de novo* review of the findings and determinations of the involved administrative agencies (the USTR and the ITC) or alternatively undertake to determine whether their findings were arbitrary and capricious has no precedential support.

Plaintiff's reliance upon the scope and standard of review of Commission proceedings in antidumping and countervailing duty cases, clearly, is misplaced since the scope and standard of review in such cases are specifically prescribed by statute. See 19 U.S.C. § 1516a(b); 28 U.S.C. § 2640(b). However, there is no statutory authority for reviewing the evidence before the USTR or the ITC or their findings in connection with the President's action under section 504.

In the final analysis, plaintiff essentially seeks to overturn *Presidential action* rather than agency findings, recommendations or advice. Since it is the President who must be the ultimate judge of the facts adduced by the USTR (on the investigation of the ITC), there is simply no occasion in the present case for judicial review of agency fact findings.[12]

CONCLUSION

Plaintiff (importer of the subject merchandise) whose protests were denied by the Customs Service pursuant to 19 U.S.C. § 1515, has standing under 28 U.S.C. § 2631(a) to contest the classification and assessment of duties on the subject merchandise.

However, under section 504(a) Congress delegated to the President broad discretionary authority of a legislative nature to withdraw, suspend, or limit duty-free treatment under the GSP; and in the instant case, the President properly exercises his authority to "limit" the application of duty-free treatment to the subject merchandise. Upon consideration of the narrow scope of judicial review in cases of congressional delegation of legislative authority to the President, particularly where foreign affairs are involved, neither the exercise of discretion by the President under section 504(a) nor his findings of fact under sections 504(a) and 504(c) are subject to judicial review. Hence, in exercise of appropriate judicial restraint, I find that plaintiff's complaint fails to state a claim upon which relief can be granted.

This action is dismissed, and judgment will be entered accordingly.

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572 F. Supp. 1279

E. R. HAWTHORNE & CO., INC., A/C VEPED TRAFFIC CONTROLS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-7-00957

Before BOE, *Judge*.

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[12] There is no merit whatever to plaintiff's contention that 19 U.S.C. § 1514 permits judicial review under the circumstances presented here. By making "the legality of all order and findings" of the appropriate customs officer final and conclusive unless a timely protest is filed in accordance with 19 U.S.C. § 1514, Congress plainly did not intend that the Courts should review the President's findings for the purpose of determining whether there was substantial evidence to support his action taken pursuant to delegated legislative authority. *Cf. T.M. Duche & Sons, Inc.* v. *United States*, 36 CCPA at 27.

Pipes And Tubes of Steel

Merchandise consisting of tapered steel tubes of varying lengths and dimensions and requiring, after importation, further substantial processing by the addition of components thereto in order to fulfill its ultimate use or uses has not attained the degree of advancement necessary for its classification as a "part" of an illuminating article, but is specifically provided for as "pipes and tubes of steel" under item 610.32, Tariff Schedules of the United States.

[Judgment for plaintiff.]

(Decided July 11, 1983)

***Rode & Qualey (John S. Rode* and *R. Brian Burke* at the trial and on the brief) for the plaintiff.**

***J. Paul McGrath,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Deborah E. Rand* at the trial and on the brief), for the defendant.**

BOE, *Judge:* The merchandise involved in the above-entitled action, described on the invoices as "round tapered black steel tubes," was classified as "Illuminating articles and parts thereof" under item 653.39, TSUS, which provides:

SCHEDULE 6, PART 3, SUBPART F

Illuminating articles and parts thereof, of base metal:

* * * * * * *

Other:

* * * * * * *

Other:

* * * * * * *

Item 653.39 Other .... 17.6% ad valorem

Plaintiff challenges the liquidated classification and asserts four alternative classifications for the subject merchandise:

SCHEDULE 6, PART 2, SUBPART B

Pipes and tubes and blanks therefor, all the foregoing of iron (except cast iron) or steel:

Welded, jointed, or seamed, with walls not thinner than 0.065 inch, and of circular cross section:

Other than alloy iron or steel:

* * * * * * *

Item 610.32 0.375 inch or more in outside diameter.. 0.3¢ per pound

or

SCHEDULE 6, PART 2, SUBPART B

Angles, shapes, and sections, all the foregoing, of iron or steel, hot rolled, forged, extruded, or drawn, or cold formed or cold finished, whether or not drilled, punched, or otherwise advanced; sheet piling of iron or steel:

Angles, shapes, and sections:

Hot rolled; or, cold formed and weighing over 0.29 pound per linear foot:

Not drilled, not punched, and not otherwise advanced:

Item 609.80 Other than alloy iron or steel.......... 0.1¢ per pound

or

SCHEDULE 6, PART 3, SUBPART F

Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars and posts and other structures and parts of structures, all the foregoing of base metal:

Of iron or steel:

* * * * * * *

Columns, pillars, posts, beams, girders, and similar structural units:

Not in part of alloy iron or steel:

* * * * * * *

Item 652.94 Other.. 4.3% ad valorem

or

SCHEDULE 6, PART 3, SUBPART G

Articles of iron or steel, not coated or plated with precious metal:

* * * * * * *

Other articles:

* * * * * * *

Other:

* * * * * * *

Item 657.25 Other.. 9% ad valorem

The subject merchandise consists of tapered steel tubes varying in length from 20 to 39 feet, a wall thickness of five millimeters (seven guage), top diameters ranging from 3.17 inches and base diameters ranging from 7 to 11 inches. The merchandise was manufactured in France by Petitjean & Cie, a producer of various types of steel items, and imported into the United States in 1980 by Veped Traffic Controls, Inc.

Products of the kind of character of the subject merchandise are manufactured from coils of steel specifically purchased by Petitjean for a particular order. The steel is then uncoiled and slit into trapezoids according to measurements meeting the specifications of the pole ordered. After the edges are cut, the pieces are bent in a press to achieve a circular shape. Finally, the edges are welded together and the tube is cleaned and straightened.

Upon importation, the tubes are subjected to further processing steps, the nature and extent of which depends upon the purpose for which the tube is to be used. Veped, a manufacturer of traffic signs and signals, designs a support structure to meet the specific needs of each order, taking into account such factors as wind velocity in the area, amount of weight to be carried and the required measurements of the pole. Drawings are made of the desired finished support structures and poles are selected with the proper specifications based on such drawings.

Orders for support structures fabricated by Veped require the addition of attachments and components to the tube. A base plate is welded onto the bottom of the pole and several clamps to support a mast arm are welded at the top of the pole. More importantly, the pole itself must be further processed; the pole is cut at the top to the exact length specified in the drawing. The ends of the tube are squared. Provisions are made for a handhole ring to be made and attached to the pole so that electrical wiring may be connected to it. The pole must be painted or galvanized to prevent corrosion or rust. If necessary, a transformer base is attached. In sum, approximately one-half of the cost, and one-third of the time, is required to produce the raw tube as is necessary to manufacture a finished support structure.

Perhaps no other area of customs jurisprudence has been the subject of what might appear to be diverse decisions as we find in considering the issues involved herein. In decisions which might initially appear to be contradictory holdings, we find upon closer examination that the determinations therein have been made applicable and/or restricted only to the individual facts involved. General rules of interpretation, as enunciated by the trial as well as by the appellate courts, often become subjected to subsequent interpretations which were neither originally intended nor are presently applicable.

Thus, in determining the proper classification of the imported merchandise it is essential that the questions of law and fact, the principles of statutory construction, and the established rules pertinent to the application of such statutes relating thereto be considered in full complementary perspective.

It is well established that the classification of the imported merchandise is determined by the character thereof at the time of its importation. *Carrington Co., United Geophysical Corp.,* v. *United States,* 61 CCPA 77, 496 F. 2d 902 (1974). Whether the imported merchandise shall be classified by its generic description, by an *eo nomine* designation or as parts of an article is dependent upon the specific TSUS provisions as well as the identity and character of the merchandise. *John V. Carr & Son, Inc.* v. *United States,* 72 Cust. Ct. 19 (1974). In determining the character and identity of the subject merchandise at the time of its importation the court must necessarily consider the degree of advancement which the merchandise has undergone as well as the use or uses, if any, of the merchandise. *Doherty-Barrow of Texas, Inc.* v. *United States,* 3 CIT 228 (1982); *United States* v. *The Carborundum Co.,* 63 CCPA 98; 536 F. 2d 373 (1976), *cert. denied,* 429 U.S. 979 (1976).

Ultimate use, alone, does not serve as the determining test for the classification of merchandise as imported. The court in *John V. Carr, supra,* at 27, has well expressed the requirement of initially determining whether such merchandise at the time of importation has been sufficiently advanced so that it can be used as a part of an article without substantial additional processing:

> It may well be that most angles, shapes and sections are *ultimately* dedicated and used as parts of articles and that such *ultimate* use determines the form in which the angles, shapes and sections are made. *See United States* v. *The Singer Manufacturing Company,* 37 CCPA 104, 106, 107, C.A.D. 427 (1950). But this scarcely means that all angles, shapes and sections are parts *per se.* Thus, if in its imported condition, and angle, shape or section has been processed or advanced in manufacture *only* to a point where substantial additional processing is necessary before it can be used as a part of a given article, the import would not be classifiable as a "part," but rather would be considered a material and thus (if meeting the other statutory requirements) classifiable under a provision for angles, shapes and sections. *See* e.g., *United States* v. *The Singer Manufacturing Company, supra,* 37 CCPA 104; *Associated Metals & Minerals Corp.* v. *United States, supra,* 65 Cust. Ct. 586. [Italics in original; emphasis supplied.]

In like manner, our appellate court through Chief Judge Markey has held that merchandise which has "not been sufficiently advanced in its manufacture to have reached a point where it is incapable of being made into other things" and whose "degree of processing had not changed (it), as imported, into a clearly identifiable part of any device," will not be classified as a part of that device. *Avins Industrial Products Co.* v. *United States,* 62 CCPA 83, 515 F.2d 782 (1975). *See* also *Terumo-America* v. *United States,* 2 CIT 121 (1981).

The defendant in support of the classification of the subject merchandise, as liquidated, predicates its argument principally on the alleged "chief use" of the merchandise as poles for illuminating articles. In so doing, the defendant relies on General Interpretative Rule 10(ij), TSUS, which provides:

> A provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

In its application of the foregoing rule, however, the defendant fails to give appropriate consideration to the qualifying phrase included therein:

> * * * but does not prevail over a specific provision for such part.

The foregoing concluding phrase of the interpretative rule instructs, that not withstanding what may be the chief use of imported merchandise, such merchandise cannot be classified as a part of an article if, as imported, it is otherwise specifically provided for in the tariff schedules. *See West Coast Glass Distributors* v. *United States,* 62 Cust. Ct. 444 (1969); [1] *Robert Bosch Corp.* v. *United States,* 63 Cust. Ct. 187, 305 F. Supp. 921 (1969).

From all the evidence submitted in the instant action it is clear that numerous steps are required to transform the merchandise, as imported, into poles or supporting structures for use with illuminating articles or for any other uses to which the merchandise might be subjected. Whether, after advancement by further required processing occurring in the United States, the subject merchandise is "chiefly used" as poles or supporting structures for illuminating articles is not relevant to the issue herein, namely—the character and identity of the subject merchandise and its use *as imported.*

It is undisputed from the evidence submitted that, as imported, the subject merchandise is destined for uses other than as the supporting structure or pole for illuminating articles. Plaintiff, after importation, further fabricates the subject merchandise for sale and ultimate use as traffic signals and traffic signs. Defendant's witness, Calvin Friar, acknowledges that, although the company by whom he is employed manufactures similar poles for ultimate use chiefly as supports for illuminating articles, the poles, as imported, could be used as supports for traffic signs, signals or flagpoles. The witness further acknowledges that the specifications of the imported poles (ASTM—Standard A 595—the standard for a tapered tubular steel product) is not limited solely to lighting poles. Despite his knowledge of the height, diameter and thickness of the subject merchandise as imported, he would not be able to identify the ultimate use of said merchandise in its imported condition and particularly as reflected by Plaintiff's Exhibits 12, 13, 16, 17, and 18. The significant need for the processing of the subject merchandise after importation, in order to fulfill its ultimate use, is evidenced by the testimony of the witness, Friar, who states "a pole which is designed to support a signal pole would not be interchangeable with a light pole." [2]

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[1] Windshields, as imported, cut and bent to fit a particular automobile, were classifiable as laminated glass, shaped, and not classifiable as parts of an automobile.

From the testimony it is clear that merchandise of the same class or kind as the imported merchandise has not been sufficiently advanced so as to have attained an identity permitting the ascertainment of its "chief use" to be a "part" of an illuminating article. It is the advancement made to the merchandise, after importation, by the addition thereto of components which are required for a specific use that causes the same to become an identifiable part of an article—whether an illuminating article, a traffic signal, a sign or a flagpole.

The defendant relies particularly on the decisions in *United States* v. *Servco Co.*, 60 CCPA 137, 477 F. 2d 579 (1973) and *John V. Carr & Son, Inc.* v. *United States, supra.* Indeed, this court does not find the reasoning in the foregoing decisions inapplicable to the facts and issues involved in the instant action. In *Servco* our appellate court specifically states that for the purposes of appeal the imported articles were *assumed* to have no other use but to be finished into drill collars and that drill collars in turn were solely used as parts of boring machines. In like manner the opinion in *John V. Carr & Son* discloses that the plaintiff therein conceded that *at the time of importation* the merchandise was used only for incorporation into railroad cars and that, in fact, the merchandise in question therein, as imported, was described by plaintiff's witness to be an integral part of a railroad car. In the instant action, on the other hand, the basic issues are (1) whether the subject merchandise has been advanced only to a point where substantial additional processing is necessary before it can be used as a part of an article and (2) whether the subject merchandise in its imported condition is specifically provided by the Tariff Schedules of the United States.

Articles which are described by name or by specific function under particular provisions of the tariff schedules are to be classified thereunder, even though they are parts of another article. *West Coast Glass, supra; J. E. Bernard & Co.,* v. *United States,* 59 Cust. Ct. 31 (1967). Item 610.32, TSUS, embodies the provision for "pipes and tubes of steel," which describes by name the subject merchandise.

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[2] R. 166.

Moreover, it has been held that a TSUS provision which describes an article by how it is made is no less specific for classification purposes than a description by name or function. *West Coast Glass, supra.*

The tariff schedules and the tariff classification studies provide little assistance in connection with the identity of and the processing steps involved in manufacturing pipes and tubes of steel. Minimal guidance is given with respect to dimension, sizes or shapes of these products. Accordingly, reference to Brussels Nomenclature is, indeed, appropriate as an aid in the interpretation and construction of the tariff schedules and particulary with respect to the intention of Congress in providing for the relevant items. The Tariff Classification Study, Submitting Report, November 15, 1960, page 8, states:

> The "Brussels Nomenclature" and the "Standard Industrial Classification Manual" exerted the greatest influence on the arrangement of the proposed revised schedules.

Heading 73.18, section XV of the Brussels Nomenclature is substantially similar to the provision for pipes and tubes of steel provided for in the Tariff Schedules of the United States. In describing the method of manufacture employed in connection with welding tubes and pipes, the following statement is included thereunder:

> (II) Welded tubes and pipes.
>
> In all processes employed for manufacturing welded tubes and pipes, the raw material is a flat semi-product (rolls of iron or steel strip in continuous welding, or strip or sheet metal if the manufacturing process must be carried out in two separate operations, which is the case when large tubes and pipes are desired). This semi-product is formed to a tubular shape and the abutting edges are then welded.

The provisions contained under heading 73.18 specifically include "conical tubes" as well as tubes which are *not of uniform diameter or wall thickness:*

> Tubes remain classified within this heading whether they are straight or curved (including coiled tubing), and whether or not they are of uniform diameter or wall thickness (e.g., locally expanded tubes, necked or waisted tubes, conical tubes and stepped tubes).

The foregoing, indeed, is informative and helpful in ascertaining the scope embraced by the Tariff Schedules of the United States with respect to the provisions thereof for pipes and tubes of steel, intended by the Congress.

From the evidence submitted in the instant action this court concludes that the subject merchandise, as imported, is erroneously classified as parts of an illuminating article under item 653.39, TSUS, for the reason that it is specifically provided for under the provisions of item 610.32, TSUS, as claimed by the plaintiff.

In view of the foregoing determination it is deemed unnecessary to consider the alternative classifications urged by the plaintiff.

Let judgment be entered accordingly.

SCHAPER MANUFACTURING CO., DIVISION OF KUSAN, INC., PLAINTIFF *v.* THE HONORABLE DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES, AND THE HONORABLE WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS, AND THE MILTON D. MYER COMPANY, INTERVENOR

Court No. 83-3-00333

Before BOE, *Judge.*

Memorandum and Order Denying the Defendants' Motion for Reconsideration

(Dated July 12, 1983)

Plaia, Schaumberg & deKieffer (*Tom M. Schaumberg* and *Alice A. Kipel*); *Romney, Golant, Martin, Disner & Ashen* (*Joseph Golant, Robert M. Ashen, Thomas D. Phillips*), for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Deborah E. Rand*), for the defendants.

Buell, Blenko, Ziesenheim & Beck (*Lynn J. Alstadt*), for the intervenor.

BOE, *Judge:* The Federal defendants have filed a motion for reconsideration of the prior order of this court denying defendants' motion to dismiss the above-entitled action for lack of jurisdiction. 5 CIT 266, 566 F. Supp. 894 (1983). The Federal defendants predicate their present motion for reconsideration primarily on the statement contained in the court's order relating to the defendants' acknowledgment of the right of an importer to protest the exclusion of the subject merchandise under 19 U.S.C. § 1514.

The court's foregoing assertion, having been based on the Federal defendants' statement contained in a preceding memorandum made in connection with its motion to strike and dismiss a claim for relief by the intervenor, failed to accurately reflect the changed position of the defendants as to the non-applicability of 19 U.S.C. § 1514 contained in their later reply to plaintiff's opposition to defendants' motion to dismiss. Whether the Federal defendants' changed position as to the non-applicability of § 1514 was intended to controvert their prior statement relating to the right of an importer to protest the exclusion of merchandise under § 1514 was unclear.

Notwithstanding a misapprehension that may have existed with respect to defendants' position, no sufficient showing has been made by the defendants that this court's prior order 5 CIT 266, F. Supp. 894 (1983) should be reconsidered and vacated and the defendants' motion to dismiss the above-entitled action for lack of jurisdiction be granted.

The Federal defendants in a motion to strike and dismiss the claim for relief asserted by the defendant-intervenor, previously made herein (April 8, 1983), correctly defined the gravamen of this action:

> * * * the merchandise being detained for these latter entries is not detained as a result of the rule, but rather as a result of the *bonding dispute which is the subject of this action.* [Italic supplied.]

Defendants' motion for reconsideration is denied.

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569 F. Supp. 853

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PLAINTIFFS v. UNITED STATES, ET AL., DEFENDANTS

Consolidated Court No. 81-7-00901

Before WATSON, Judge.

ITC Review of Injury Determination

The Court finds a lack of substantial evidence for the ITC's review determination that importations of television sets from Japan, presently subject to an antidumping duty order, would threaten injury to a United States industry if the antidumping duty order were to be revoked. The ITC determination is reversed and remanded.

[Judgment for plaintiffs reversed and remanded.]

(Decided July 14, 1983)

Weil, Gotshal & Manges (*A. Paul Victor, Stuart M. Rosen, Harry M. Davidow* of counsel) for plaintiffs Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Panasonic Hawaii, Inc., and Panasonic Sales Company, a Division of Matsushita Electric of Puerto Rico, Inc., Victor Company of Japan, Limited and US JVC Corp.

Sharretts, Paley, Carter & Blauvelt, P.C. (*Gail T. Cumins* and *Ned Marshak* of counsel) for plaintiffs Sanyo Electric Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation.

Tanaka, Walders & Ritger (*H. William Tanaka* and *Lawrence R. Walders* of counsel) for plaintiffs Hitachi, Ltd., Hitachi Sales Corporation of America, and Hitachi Sales Corporation of Hawaii.

Arent, Fox, Kintner, Plotkin & Kahn (*Robert H. Huey, Stephen L. Gibson* and *Rodney F. Page* of counsel) for plaintiffs Toshiba Corporation, Toshiba America, Inc., and Toshiba Hawaii, Inc.

Baker & McKenzie (*Thomas P. Ondeck* of counsel) for plaintiff Mitsubishi Electric Corporation.

Wender, Murase & White (*Peter J. Gartland* and *Robert D. Piliero* of counsel) for plaintiff Sharp Electronics Corporation.

Siegel Mandell & Davidson, P.C. (*Brian Goldstein* and *Edward B. Ackerman* of counsel) for plaintiff General Corporation of Japan.

United States International Trade Commission, Office of the General Counsel (*Michael H. Stein,* General Counsel; *Joel R. Junker,* Assistant General Counsel for Litigation; *Jane Katherine Albrecht,* Attorney) for the defendant United States.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson* and *J. Eric Nissley* of counsel) for the defendant intervenor Zenith Radio Corporation.

WATSON, *Judge:* This is a judicial review of a determination[1] in which the U.S. International Trade Commission (ITC) found that an industry in the United States would be threatened with materal injury if an antidumping duty order issued against television sets from Japan[2] were to be modified or revoked. The ITC had to first find that circumstances had changed sufficiently since the issuance of the antidumping duty order to justify the type of administrative review provided in section 751(b) of the Tariff Act of 1930 (19 U.S.C. § 1675(b)).[3] The result of the ITC's review was then challenged by the proponents of revocation[4] in an action brought under 19 U.S.C. § 1516a(a)(2)(B)(iii), which action requires the Court to hold unlawful any determination found to be unsupported by substantial evidence, or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B).

The Court has examined the administrative record, studied the briefs of the parties and listened to oral argument. As a result, the Court concludes that in one essential respect the determination was not based on substantial evidence. There was no substantial evidence to support the conclusion that the level of importations from Japan would be injurious if the antidumping order were to be revoked.

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[1] *Television Receiving Sets From Japan,* Inv. No. 751-TA-2, USITC Pub. No. 153, 46 Fed. Reg. 37,702 (1981).

[2] This antidumping duty "order," as it is now called, was technically a dumping "finding" at the time it was made in 1971 in T.D. 71-76. The "order" was issued following a determination by the Secretary of the Treasury that television sets from Japan were being or were likely to be sold at less than fair value (35 Fed. Reg. 18,549 (1970)) and a determination by the United States Tariff Commission (now the ITC) that an industry in the United States was being injured by reason of importations of such merchandise. The determination of injury was published in *Television Receiving Sets From Japan,* Inv. No. AA 1921-66, USTC Pub. No. 367, 36 Fed. Reg. 4,576 (1971).

[3] For convenience, the portion of the provision which is applicable here is highlighted by script type face.

19 U.S.C. § 1675 Administrative review of determinations.

* * * * * * *

(b) *Reviews upon information or request.*

(1) *In general. Whenever the* administering authority or the *Commission receives* information concerning, or *a request for the review of,* an agreement accepted under section 704 or 734 [19 U.S.C. § 1671c or 1768c] or *an affirmative determination made under section* 704(h)(2), 705(a), *705(b),* 734(h)(2), 735(a), or 735(b) [*19 U.S.C.* § 1671c(h)(2), *1671d (a), (b),* 1673c(h)(2), or 1673d (a), or (b)], *which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register.* In reviewing its determination under section 704(h)(2) or 734(h)(2) [19 U.S.C. § 1671c(h)(2) or 1673c(h)(2)], the Commission shall consider whether, in the light of changed circumstances, an agreement accepted under section 704(c) or 734(c) [19 U.S.C. § 1671c(c) or 1673c(c)] continues to eliminate completely the injurious effects of imports of the merchandise.

(2) *Limitation on period for review. In the absence of good cause shown—*

(A) *the commission may not review a determination under section 705(b)* or 734(b) [*19 U.S.C. § 1671d(b)* or 1673d(b)], and

(B) the administering authority may not review a determination under section 705(a) or 735(a) [19 U.S.C. § 1671d(a) or 1673d(a)], or the suspension of an investigation suspended under section 704 or 734 [19 U.S.C. § 1671c or 1673c],

less than 2½ months after the date of publication of notice of that determination or suspension.

[4] The proponents of revocation who are plaintiffs here are Matsushita Electric Co., Ltd., Matsushita Electric Corporation of America, Panasonic Hawaii, Inc., Panasonic Sales Company, a Division of Matsushita Electric of Puerto Rico, Inc.; Victor Company of Japan, Ltd. and US JVC Corp.; Sanyo Electric Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corp.; Hitachi Ltd., Hitachi Sales Corporation of America, and Hitachi Sales Corporation of Hawaii; Sharp Electronics Corporation; Toshiba Corporation, Toshiba America, Inc., and Toshiba Hawaii, Inc.; Mitsubishi Electric Corporation; and General Corporation of Japan.

I

The Court begins with a holding that, if the ITC is the only agency from which such a review is sought, it has to presume, as it did, that such imports as will be made will be at less than fair value. This may produce some anomalies [5] but it is the only result which is consistent with the fact that the International Trade Administration of the Department of Commerce (ITA) has the power to conduct a "changed circumstances" review of its original determination of sales at less than fair value.[6] What the ITA thought about the likelihood of future sales at less than fair value, was unknown to the ITC and that unknown factor must operate as a presumption in the ITC's review.

The ITA's review powers would be pointless if the question of whether there will be sales at less than fair value could be reviewed and resolved by the ITC alone. In order to give meaning to the separation of function which runs throughout the law, the ITC must presume that future sales will be at less than fair value if the ITA has not reviewed the matter.[7]

In sum then, the choices of a party seeking a "changed circumstances" review under section 751(b) are two. It can seek review by the ITA on the question of sales at less than fair value and, if the ITA still finds the presence or likelihood of sales at less than fair value, it can move on to the ITC and seek a conclusion that, nevertheless, material injury will not result. As an alternative, a party can forego review by the ITA and go directly to the ITC. The latter strategy must result in the unalterable persumption in the ITC review that such sales as there will be, will be at less than fair value.

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[5] The ITC may find that imports will increase due to conditions which normally would allow the imports to be priced at fair value, or even at a premium. Nevertheless, if the *ITA* has not made a changed circumstances review, the presumption that future sales would be at less than fair value would operate to require that sales of the increased imports be considered to be at less than fair value. This anomaly may be displayed in the second ITC scenario, discussed later in the main text, which has the Japanese temporarily increasing their exports to the U.S. market to meet short-term increases in U.S. demand.

[6] The ITA rules are found at 19 CFR §§ 353.53, 353.54. 19 CFR § 353.53, Administrative Review of determinations.

* * * * * * *

(b) *Changed circumstances.* (1) Whenever the Secretary receives information concerning, or a request for the review of, an Antidumping Duty Order or Finding, or an agreement on the basis of which an investigation was suspended, which shows changed circumstances sufficient to warrant review of such Order, Finding or agreement, he shall, before conducting such review, publish a "Notice of Intention to Review Antidumping Duty Order" or "Notice of Intention to Review Suspension Agreement" in the FEDERAL REGISTER. Such Notice shall indicate the merchandise concerned, and any changed circumstances or other significant issues then known which will be considered during the review.

(2) In the absence of good cause shown, no review based on allegations of changed circumstances shall be conducted within 24 months after the date of an Affirmative Final Determination or a determination to suspend an investigation.

* * * * * * *

§ 353.54 *Revocation of antidumping duty orders and termination of suspended investigations.*

(a) *In general.* Whenever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order or a suspended investigation are no longer being made at less than fair value within the meaning of section 731 of the Act and is satisfied that there is no likelihood of resumption of sales at less than fair value, he may act to revoke or terminate, in whole or in part, such Order or Finding or suspended investigation. Ordinarily, consideration of such revocation or termination will be made only subsequent to a review as described in § 353.53 of this part.

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[7] The ITC can work with the most recent results of any *annual* review of sales at less than fair value conducted by the ITA under section 751(a) [19 U.S.C. § 1675(a)] but that cannot be used to infer the absence of the likelihood of *resumption* of sales at less than fair value, which is for the ITA alone to decide.

II

The presumption that future sales will be at less than fair value represents the limit of the presumptions which the ITC can make in this review. As will be explained later, in all other respects the review is a neutral investigation of the likelihood of the recurrence of injury. The ITC has stated its task to be an investigation of whether an industry in the United States would be materially injured or threatened with material injury by reason of imports of the merchandise covered by the antidumping order if the order were to be modified or revoked.[8]

The ITC determination of this question consisted of two subsidiary findings, first, that the U.S. industry was still in a delicate state of health and second, that the levels of imports from Japan, after the antidumping duty order was revoked, would cause injury. The finding as to the health of the U.S. industry was supported by substantial evidence in the form of evidence that it was highly competitive, price sensitive and showing low profitability. Although there were other, possibly more significant, signs of recovery in the industry and, although competition could be seen as an indicator of health,[9] these are matters of weighing and interpreting economic evidence on which the Court will defer to agency expertise.

On the other hand, the subsidiary finding that import levels would be injurious in the absence of the antidumping duty order was not supported by substantial evidence even in the loosest sense. This finding took the form of a prediction that import levels from Japan would increase significantly. The finding about future import levels gave three supporting reasons, first, the present intentions of the Japanese, second, their production capacity, and third, the incentives or motivations which would govern their future behavior.

The judgment of present intentions is a proper, and possibly controlling element of a review by the ITC. *City Lumber Co.* v. *United*

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[8] 19 CFR § 207.45.

§ 207.45 *Investigation to review outstanding determination.*

(a) *Purpose.* Upon the receipt of information concerning, or upon a request for a review of, a determination concerning a suspension agreement accepted under section 704 or 734 of the Act or an affirmative determination made under section 704(h)(2), 705(b), 734(h)(2), or 735(b) of the Act, or a determination which resulted in an order issued under the Antidumping Act, 1921, or section 303(b) of the Act, which shows changed circumstances sufficient to warrant a review of such determination, the Commission shall institute an investigation to determine, as the case may be: (1) Whether, in light of the changed circumstances, the agreement continues to completely eliminate the injurious effect of imports of the merchandise; or (2) whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by the countervailing duty order or the antidumping order if the order were to be modified or revoked. In the case of an evenly divided vote as to whether a Commission determination should be affirmative or negative, the outstanding agreement or order shall remain unaffected. In the absence of good cause shown, no investigation under this section shall be instituted within 24 months of the date of publication of the notice of the suspension or determination.

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[9] These other factors were stressed in the dissent by Commissioner Stern.

States, 59 CCPA 89, 96, C.A.D. 1945, 457 F2d 991 (1972). Here, however, it was not based on any positive evidence tending to show an intention to increase the levels of importation. The judgment that import levels would intentionally increase was expressed by statements of the ITC that there was no basis to believe otherwise;[10] that the ITC was not convinced otherwise by the statements of counsel;[11] that there was no direct testimony by counsel or corporate executives;[12] that there was an absence of credible submissions.[13] All this demonstrates that, despite its protestations that it was not placing a burden of proof on the proponents of revocation,[14] the ITC relied on an asserted failure of the Japanese interests to introduce evidence, combined with a decision that the evidence which was submitted lacked credibility.

In this case, on the subject of intention, this approach indicates that a presumption was made that the intention to increase imports (which was temporarily restrained by the existence of an antidumping duty order) remained undiminished.

Such a presumption is not permitted by the law, which envisages a review conducted by the ITC, and gives no inkling that in marked contrast to all the other phases of an antidumping investigation, here for the first time a burden is placed on a party. If a party can be said to have a burden of proof in these matters it is the burden of proving to the agency that circumstances have changed sufficiently to justify a review. In the review itself, however, the only burden on a party is the burden of cooperating with the investigation of the administrative agency. The credibility of testimony is important only when a party has a burden of proof, or when there is conflicting testimony as to facts. If, after all is said and done, the ITC has nothing more than its dissatisfaction with a party's evidence on which to base a determination, it is not relying on substantial evidence.

III

To a large extent, the difficulties in this administrative determination had their origin in a misconception of the nature and purpose of the administrative review.

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[10] 46 Fed. Reg., pp. 32,703, 32,706.

[11] 46 Fed. Reg., pp. 32,703.

[12] 46 Fed. Reg., pp. 32,703, 32,706.

[13] 46 Fed. Reg., pp. 32,703, 32,706, 32,707.

[14] In footnote 12 of its determination (46 Fed. Reg. 32,706), the ITC stated as follows:

> It is appropriate here to add a word about the task of providing information to the Commission. Once the petitioning importers have persuaded the Commission that changed circumstances warrant institution of a review investigation, there is no indication in the statute, the legislative history, or in our regulation of a burden of proof, or even of coming forward, on either proponents or opponents of revocation of the order. The Commission's only guidance is that it must "conduct a review." Tariff Act of 1930, § 751(b)(1), 19 U.S.C. 1675(b)(1). A Commission review determination will be overturned, however, if "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 516(a)(2)(iii)(b)(1)(B). The Commission has a subpena [sic] power, 19 U.S.C. 1333, but it must necessarily rely on evidence voluntarily submitted by, and on the initiative of, the participants. This is doubly true when the information needed to support a determination is completely within the control of the participants who stand to gain from that determination and who seek it by petitioning for review. Let us make clear that there is no legal evidentiary burden on a participant to come forward with evidence or to persuade the Commission, but neither is it reasonable to expect the Commission to make a petitioner's case for it.

The statutory language gives no details about the conduct of these administrative reviews.[15] The legislative history is unrevealing.[16] The ITC has stated that its review should be a determination of whether the industry would be threatened with material injury from imports of the product covered by the order if the antidumping duty order were to be modified or revoked. In the review, the ITC saw itself in the position of having to honor the basic protective intent of the antidumping law; that is to say, it believed it had to treat the continuing validity of the existing antidumping order as a premise of the review.[17] This led it to go beyond its neutrally stated objective and to engage in a presumption that injury would recur and to place a burden on the proponents of revocation to prove otherwise. However, although the purpose of antidumping duties is unquestionably to protect American industry, the provision for review of final injury determinations cannot be given the same protective motive.

In the opinion of the Court, in order for the review provision to operate consistently within the structure of this law and in order for it to function in harmony with one of the international agreements which the law was intended to implement, the review must establish the continuing need for the injury determination. If it cannot do so, the original determination has become vestigial.

This conclusion is necessitated by the statutory prerequisite to administrative review, namely, that circumstances have changed since the issuance of the antidumping order. A preliminary determination that circumstances have changed means, in this case, that there is some evidence to support the view that the original injury determination is no longer valid. This is the fundamental justification for a review of the injury determination. If the ITC had found that there was *not* a sufficient change of circumstances to justify a review, that decision would have been judicially reviewable under 19 U.S.C. § 1516a(a)(1)(A)(ii).[18] On the other hand, the finding of changed circumstances sets in motion the review process. This can only mean that a new investigative finding is needed to maintain the validity of the injury determination in the new circumstances. If the threat of injury cannot be found, or if a finding that there is a threat is not supported by substantial evidence, the unavoidable inference from the evidence of changed circumstances is that the threat of injury has dissipated.

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[15] See note 3, *supra*, for the text of 19 U.S.C. § 1675(b).

[16] The entire explanation of 19 U.S.C. § 1675 consists of the following, which appears to be addressed to the annual reviews of § 1675(a): "This provision expedites the administration of the assessment phase of antidumping and countervailing duty investigations. It provides a greater role for domestic interested parties and introduces more procedural safeguards." S. Rep. No. 249, 96th Cong., 1st Sess., 80, 81 (1979).

[17] 46 Fed. Reg. 32,704 (1981) stated as follows:

> It is plain that the antidumping provisions of title VII of the Tariff Act of 1930 are intended to protect U.S. industries from injurious unfair trade practices. Thus, our review must also have the same intent, while allowing importers the opportunity to demonstrate that their imports will not materially injure the domestic industry.

[18] § 1516a. *Judicial review in countervailing duty and antidumping duty proceedings*

> *(a) Review of determination.*
>
> (1) *Review of certain determination.*
>
> (A) Thirty-day review. Within 30 days after the date of publication in the Federal Register of notice of—
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> * * * * * * *
>
> (ii) a determination by the administering authority or the Commission, under section 751(b) of this Act [19 U.S.C. § 1675(b)], not to review an agreement or a determination based upon changed circumstances,
>
> * * * * * * *
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusion upon which the determination is based.

Another important factor is the necessity and desirability whenever possible, of harmonizing this law with the international agreements it was intended to implement. Section 2(a) of the Trade Agreements Act of 1979 (19 U.S.C. § 2503(a)) expressly approved the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) which relates to antidumping measures, and is referred to as the International Antidumping Code. Article 9(a) of the Code relates to the review of antidumping duty orders and provides that "an anti-dumping duty shall remain in force only as long as,.and to the extent necessary to counteract dumping which is causing injury." The injury referred to includes the threat of material injury.[19] It would be unreasonable to take or maintain the potent measures of these laws for anything more diffused than the threat of material injury. It must follow that when the continued necessity for the antidumping duty is placed in question by a change in circumstances, the review required by section 751(b) must either find reason for continuation of the duty or lead to revocation.

The formalization of the review process, the passage of time,[20] the change of circumstances, the international commitment not to leave antidumping orders in place longer than necessary, the elaboration of the related revocation power of the ITA[21] all suggest that in this review the continuation of an antidumping order depends on a finding that injury is still a threat. As noted, it also possible to reason from the lack of an explicit burden of proof on the proponents of revocation and from harmony with the earlier stages of these investigations in which there is no burden of proof on a party. From all this, it can be concluded that the ITC has the duty to investigate whether there is a threat of injury and if it cannot find one, it must recommend revocation of the order.

The Court is satisfied that this does not make a foregone conclusion of the review process and does not present the ITC with an impossible task. In keeping with normal principles of administrative law, the Courts sustain a determination which is supported by substantial evidence even if it does not represent the view of the evidence which the Court might have taken. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966).

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[19] Footnote 1 to Article 3 of the Code reads as follows:

Under this Code the term "injury" shall, unless otherwise specified, be taken to mean material injury, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

[20] This ITC review must normally wait until at least two years from the publication of the determination under review. 19 U.S.C. § 1675(b)(2).

[21] 19 U.S.C. § 1675(c) reads as follows:

(c) *Revocation of countervailing duty order or antidumping duty order*. The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order, or terminate a suspended investigation, after review under this section. Any such revocation or termination shall apply with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on and after a date determined by the administering authority.

In this matter, however, it became apparent that the determination, although disarming in its candor, went beyond the limits of administrative fact-finding in several important respects. There is nothing to support the ITC's subsidiary finding that the Japanese presently intend to increase imports if the antidumping duty order is revoked or modified. The ITC could not derive intent from a presumption that the antidumping order was presently restraining intent, or from a failure by the proponents of revocation to offer evidence of a lack of intent, or solely from a disbelief in the credibility of the evidence offered.

IV

The ITC's concentration on intent makes it difficult to isolate the grounding of the ITC determination in objective economic factors. To a certain extent even the later conclusions that develop those factors are clouded by the element of assumed intention and the vestiges of a presumed increase in import quantities. Nevertheless, the evidence regarding the objective factors of production capacity and economic incentives or motivation has been analyzed by the Court and has been found wanting.

Evidence of production capacity alone does not support the ITC's conclusion that imports would increase. First, it is not stated by the ITC as a self-sufficient basis for finding that import levels would increase and it is questionable whether raw capacity could provide such a basis, without being reconciled with the tremendous increase of the production capacity of related Japanese-owned companies in the United States.

In this regard, the development of a coherent finding was probably impeded by the undisputed fact that the Japanese had established significant production facilities in the U.S. with which they were supplying approximately twenty-five percent of U.S. demand at the time of the ITC review determination. A determination that the Japanese would import at increased levels would have had to confront the question of the apparent irrationality of such behavior *vis a vis* their American production facilities. The ITC did not see sustained or prolonged increases in importations. It saw only short-term supplemental penetrations, which, as will be explained, even if correctly foreseen, would not cause material injury.

Second, even in the combination of capacity with other economic factors the ITC did not have substantial evidence for concluding that import levels would be injurious. This emerges from a close examination of the examples of injury predicted, which will be referred to as the scenarios. The first scenario,[22] combines increased demand in the U.S. market (for which the evidence is definitely substantial) with a virtual assumption that, given the production flexibility of the Japanese, importations of their products will increase.

The first scenario is not really a finding that import levels will be injurious, but a step beyond that to a prediction, which is probably a truism, that prices would be suppressed if the Japanese were to increase import levels at less than fair value. In effect, it assumes that import levels will increase and finds that prices will then be suppressed.

The second scenario,[23] is somewhat more specific. It sees the Japanese using imports to supplement their American production when there are short-term, cyclical increases in demand, in order to secure the increased market share until the U.S. production can be expanded. Although there may have been substantial evidence for finding that there would be short-term increases in imports,[24] the outcome of this scenario would not be injury but a form of assistance to the U.S. industry. If the inclusion in the U.S. industry of Japanese-owned production facilities is accepted (and this is a premise of the ITC review), then any short-term import strategy designed to temporarily occupy a market segment for the benefit of related American subsidiaries, would be a benefit for the industry.[25] If it does harm, it does so to competitors within the U.S. industry, not to the industry as a whole.

The third scenario has two variants, both of which are conjectural in origin and development. The first variant [26] begins with dif-

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[22] 46 Fed. Reg. 32,706 stated as follows:

> There are at least three ways in which continued or resumed dumping upon revocation of the order can materially injure the domestic industry. First, the domestic market is currently highly competitive, and although demand is high, profitability is relatively low. If demand continues to pick up, and some sources are predicting an increase of as much as 50 percent over three to five years, renewed or increased dumping by the importers could keep prices suppressed when they would normally rise. The Japanese producers would thus be able to increase market share for both their imports and domestic production through LTFV sales, found to be injurious in 1971.

[23] 42 Fed. Reg. 32,706 stated as follows:

> Second, business planners will increase capacity only when certain that it will be used. The Japanese can use dumped imports to supplement domestic production when there are short-term, cyclical increased [sic] in demand. They can be expected to use imports to secure any increase in market share, and then gradually increase domestic production capacity to consolidate and maintain it. There is some indication that this phenomenon is occurring now with the antidumping order in place. The 13-inch screen size is one of the most dynamic growth areas in the industry; there was an increase in apparent consumption of 44 percent in the first quarter of 1981 over that in the corresponding period of 1980. At the same time, imports of 13-inch sets from Japan increased 400 percent. The Japanese importers say that the increase occurred because of a shortage of domestically sourced picture tubes. In response to inquiries by the staff, however, domestic tube producers contend that except for a temporary shortage in October and November, 1980, there was an adequate supply through the first quarter of 1981. Moreover, some production schedules are even being revised downward because of burgeoning inventories. Staff memorandum INV-E-036 (Apr. 9, 1981). In any case, this considerable increase in imports is a demonstration of the supply flexibility available to the Japanese companies, a flexibility that would be enhanced by the removal of restrictions on pricing. [Footnotes omitted]

[24] The observed surge in imports of sets with 13" screens which occurred during the investigation can be accepted as substantial evidence for a "supplementation" finding.

[25] In this respect, the second scenario may be inconsistent with the ITC's finding that there was no special coordination between the Japanese and their American subsidiaries and hence, no reason to exclude the American subsidiaries from the definition of industry under 19 U.S.C. § 1677(4)(B).

[26] 46 Fed. Reg. 32,706 stated as follows:

> The third area of concern is the problem of production and distribution of the television receiver's largest and most expensive component, the picture tube. There are indications of a softening of demand for Japanese tubes in their other major overseas markets, particularly Asia and Europe. The decrease in demand appears to be due to an increase in local production capacity in those areas. In order to utilize Japanese

Continued

fuse predictions of surplus production of Japanese picture tubes leading to the use of those tubes to increase Japanese television production and then to increased exportations to the attractive U.S. market. The second variant[27] begins with the unsupported projection of restraints on the importation of Japanese televisions or tubes in various important foreign markets and moves directly to the shift of the resulting excess production to the U.S. market.

The Court agrees that this review can be predictive in nature, looking beyond the revocation of the antidumping duty order.[28] In this sense, it may have to be somewhat more predictive than the determination in the original investigation that there is a threat of injury. This may be necessary because in this review the antidumping order, operating as a strong corrective or deterrent, can be presumed to distort the meaningfulness of observable data regarding present conduct in the U.S. market.

However, it does not follow that these circumstances justify the use of something less than substantial evidence as the starting point for agency reasoning.[29] The *nature* of the factual predicate in a review may vary. It may have to consist of facts derived from outside the U.S. market or outside the producers' home market. It may have to involve facts regarding important component parts of the products in question. It may have to include other measurable economic factors upon which it is reasonable to base inferences. But, in all instances, the factual predicate, i.e., the base on which the inferences are made must have a present, verifiable substance to it. This is lacking in the ITC findings. There was no real evidence of restraints in any other markets on the sale of Japanese television sets or tubes. As a result, the diversion of those sets to the U.S. market was only a speculation. The future occurrence of excess tube production in Japan was, in itself, more a prediction than a finding of fact. It then required a further prediction that excess tube production would force excess television production and would then require increased exportation to the United States. This was a chain of predictions set on an insubstantial base and was entirely conjectural. It is of crucial importance to the fair ad-

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> home production capacity more efficiently, they will need other outlets. The increase in demand in the U.S. makes it a likely target. In fact, import data for January-April 1981 show a sharp increase in tube imports from Japan.
>
> There is an additional factor that, combined with revocation of the order, could make it advantageous to bring in the additional tubes in the form of complete sets. Imported tubes are subject to a duty of 15 percent. They are bulky, fragile, and costly to ship. With the greater flexibility available after the lifting of the order, there may be an incentive to bring in complete sets, or subassemblies, including tubes now covered by the order, at the lower overall duty rate of 5 percent. [Footnotes omitted]

[27] 46 Fed. Reg. 32,706–7 stated as follows:

> Finally, any major import restraint on sets or tubes in the European Community, Asia, or Latin America, or a softening of the Japanese domestic market, will encourage a diversion of trade to the United States, the largest and most open market in the world. It is a relatively simple matter to shift a production line from sets compatible with the European broadcast system to sets compatible with the U.S. system. There will be added incentive to rationalize production and alter pricing practices when faced with such problems as excess capacity, export market constraints, and shift in demand in the world marketplace.

[28] Of course, it is still possible that *present* susceptibility to injury can be detected in a review and can be so great that levels of importation are relatively academic.

[29] This point is connected to the dispute over whether the ITC review injury determination has to find that the threat of injury is real and imminent. This should be a corollary of the requirement of substantial evidence and can hardly be disputed. *Alberta Gas Chemicals Inc.* v. *United States*, 1 CIT 312, 515 F. Supp. 780 (1981).

ministration of this law that these determinations, even in their most predictive mode, must detect real and imminent events and must have a basis in substantial evidence.

V

The Court has found no support in the case law for the reworking of the substantial evidence standard for which the ITC is, in effect, asking. It has not been persuaded that the ITC review determination involved matters of such an inherently indeterminate and inchoate nature that it is impossible to base decisions on conventional evidence.

The decision in *Industrial Union Department* v. *American Petrol. Inst.*, 448 U.S. 607 (1979) is by far the most instructive of the many cases cited by the parties. Its lesson is all the more important because the agency in that case was operating in a relatively unknown area to an even greater extent than the ITC. In that case, the Supreme Court affirmed the holding of the Court of Appeals that the Secretary of Labor lacked substantial evidence to lower from ten parts per million (10 ppm) to 1 ppm the maximum worker exposure to the cancer-causing chemical, benzene. The new standard was based on *assumptions* that exposure at levels below 10 ppm caused cancer and that the risk of cancer would decrease as exposure levels decreased. The Supreme Court found that the burden was on the Secretary to show on the basis of substantial evidence that existing standards presented a significant risk of material health impairment and further held that this was not a disabling burden. It remained within the agency's responsibility to determine what it considers significant,[30] it could have some leeway in making that determination on the frontiers of scientific knowledge, and could even take the more conservative position. The Supreme Court further stated:

> Thus, so long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection. 448 U.S. at 656.

The aforementioned case shows both the weakness of the ITC approach and, at the same time, offers encouragement to proper determinations.

The same situation is seen in a more competitive context in *Boise Cascade Corp.* v. *Federal Trade Commission*, 637 F.2d 573 (9th Cir. 1980). In that case, the Court of Appeals found that the Federal Trade Commission (FTC) lacked substantial evidence to conclude that a system of delivered pricing (using West Coast freight rates) used by certain Southern plywood mills, had an anti-competitive effect in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Court found that the FTC's conclusion was "little more than a theory of the likely effect of the challenged pricing practices" (637 F.2d at 578) and was "largely a deduction from the Commission's reasoning about the tendencies of the challenged practice." (637 F.2d at 580). In addition, the Court held that the FTC's approach had the effect of requiring the Southern mills to prove that the challenged practices had no anti-competitive effect.

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[30] 448 U.S. at 655 including footnote 62.

In the interests of enforcement they may not take leave of normal practice, may not place burdens where they should not be placed, and may not use impermissible assumptions and suppositions rather than substantial evidence.

The only possible distinction in this case is that here the administrative agency is doing its work on its own previous determination. However, as has been pointed out, that earlier determination can be given no special standing in setting the burdens and responsibilities of the ITC. In all respects, this review has the character of a renewed investigation, in changed circumstances, into the existence of a threat of material injury.

A case such as *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F.2d 467 (D.C. Cir. 1974), does not help the ITC. In that case the decision made by the Secretary of Labor under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (OSHA) setting low limits for worker exposure to asbestos was upheld as rational and within his authority. The Court of Appeals frankly stated that it could not use the statutory substantial evidence standard for those of the Secretary's findings which were on the frontiers of scientific knowledge, and which were, in reality, policy or quasi-legislative decisions which he was authorized to make. The decisionmaking process of the ITC does not have the same difficulties and it does not require the same freedom of action. In any event, the ITC does not have the same mandate for quasi-legislative action in its factfinding investigations as the Secretary of Labor has in promulgating general rules and standards. The ITC cannot engage in the same "better to be safe than sorry" reasoning. Questions of whether there is a threat of injury which precludes revocation have been resolved without speculative reasoning or legislative creativity and there is no reason to think that the ITC cannot find substantial evidence in its area of expertise.

In sum, the Court finds that there was a lack of substantial evidence to support the ITC's determination regarding a threat of material injury from imports of television receiving sets from Japan. A remand for further clarification or investigation is not called for in this situation. This is not a case in which the ITC failed to sufficiently articulate its rationale to allow judicial review as in *SCM Corp.* v. *United States,* 84 Cust. Ct. 227, C.R.D. 80-2, 487 F. Supp. 96 (1980); nor is it a case in which a corpus of correct data has to be investigated for the first time as in *Sprague Electric Co.* v. *United States,* 84 Cust. Ct. 260, C.R.D. 80-6 (1980) modifying on reh. g., 84 Cust. Ct. 243, C.R.D. 80-3, 488 F. Supp. 910 (1980).

Here, the unavoidable conclusion from the lack of substantial evidence of a threat of injury is that, in the light of changed circumstances, there is no threat of injury. Accordingly, it is hereby

ORDERED that the determination of the ITC is reversed and it is further

ORDERED that the ITC shall reach a new determination consistent with this opinion.

REPUBLIC STEEL CORPORATION, UNITED STATES STEEL CORPORATION, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND COMPANHIA SIDERURGICA PAULISTA (COSIPA), ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 82-3-00372

Before WATSON, *Judge.*

Memorandum Opinion and Order

Cravath, Swaine and Moore (Alan J. Hruska) for plaintiffs Republic Steel Corporation, Inland Steel Company, Jones and Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

Law Department of United States Steel Corporation (D. B. King, J. J. Mangan, and *L. Ranney)* for plaintiffs United States Steel Corporation.

United States International Trade Commission, Office of the General Counsel (Michael H. Stein, General Counsel; *Warren Maruyama,* attorney) for defendants United States of America and United States International Trade Commission.

Wald, Harkrader and Ross (Christopher Dunn and *Arthur J. Lafave III)* for defendent-intervenors Companhia Siderurgica Paulista (COSIPA), Usinas Siderurgicas de Minas Gerais (USIMINAS), Companhia Siderurgica Nacional (CSN), Acos Villares, S.A., Siderurgica Nossa Senhora Aparecida S.A., Acos Finos Piratini S.A., Companhia Acos Especias Itabira (ACESITA) and Acos Anhanguera S.A.

WATSON, *Judge:* Plaintiffs Republic Steel Corporation, Inland Steel Company, Jones and Laughlin Steel Incorporated, National Steel Corporation and Cyclops Corporation moved on May 2, 1983, and defendant-intervenors Companhia Siderurgica Paulista (COSIPA), Usinas Siderurgicas de Minas Gerais (USIMINAS), Companhia Siderurgica Nacional (CSN), Acos Villares, S.A., Siderurgica Nossa Senhora Aparecida S.A., Acos Finos Piratini S.A., Companhia Acos Especias Itabira (ACESITA) and Acos Anhanguera S.A. moved on May 4, 1983, for access to certain documents in the administrative record that have been designated "business confidential." On May 17, 1983, plaintiff United States Steel Corporation filed an opposition to both of the aforementioned motions for access, objecting to the release of customer names and addresses contained in responses to U.S. International Trade Commission

(ITC) questionnaries, and characterizing the intervenors' request for access as premature and overly broad.

The Court is of the view that U.S. Steel Corporation lacks standing to object to the intervenors' motion for access to parts of the administrative record of the Brazilian carbon steel investigations. U.S. Steel was originally a party only to Court No. 82-7-01053, seeking review of the ITC's preliminary negative injury determination involving cold-rolled sheet steel from the Republic of Korea. The Court's subsequent orders consolidating that case with three other actions challenging ITC deteminations with respect to steel from Spain and Brazil did not expand U.S. Steel's status or rights to include them as a party in the appeals of the Spanish and Brazilian determinations. *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 496-497 (1933); *Katz* v. *Realty Equities Corp. of N.Y.*, 521 F.2d 1354 (2d Cir. 1975).

Nonetheless, U.S. Steel does have a significant interest in maintaining the confidentiality of the customer information it submitted to the ITC during the investigations leading to the various determinations now under review in this consolidated action. Therefore, pursuant to Rule 1(a) of this Court, and under its general powers to transform a motion in the interests of justice, the Court has entertained U.S. Steel's objection to the release of its customer information, not as a party, but rather as a respondent to the ITC's investigative questionnaries, which has been granted leave to appear specially on the question of customer names and addresses. The Court regards this type of information as particularly sensitive, given the potential for competitive harm to the submitter upon disclosure. Disclosure should be withheld unless particularly justified.

In all other respects, U.S. Steel's opposition will not be entertained.

Accordingly, it is hereby

ORDERED that plaintiffs' and defendant-intervenors' motions for access are hereby granted subject to the following terms and conditions:

1. The Clerk of the Court is directed to take such steps as are necessary to insure that the names and addresses of customers of United States Steel Corporation on the questionnaire responses of United States Steel Corporation are not disclosed.

2. Documents contained in the administrative record filed by the defendant United States International Trade Commission, which have been designated as "business confidential" shall be made available to the attorneys of record for plaintiffs Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation and Cyclops Corporation at the Courthouse for inspection and copying no later than five working days from the date of entry of this order.

3. The documents identified on the attached appendix shall be made available to William H. Barringer, Christopher Dunn, and Arthur J. Lafave III, attorneys in the law firm of Wald, Harkrader and Ross, counsel for Companhia Siderurgica Paulista (COSIPA), Usinas Siderurgicas de Minas Gerais (USIMINAS), Companhia Siderurgica Nacional (CSN), Acos Villares, S.A., Siderurgica Nossa Senhora Aparecida S.A., Acos Finos Piratini S.A., Companhia Acos Especias Itabira (ACESITA) and Acos Anhanguera S.A. at the Courthouse for inspection and copying no later than five working days from the date of entry of this order.

4. All information not otherwise available in the public portion of the administrative record shall be considered as confidential.

5. The above-described attorneys (hereafter "Attorneys") shall not disclose the information to anyone (including any officer, shareholder, director, or employee of any of the parties in this matter) other than their *immediate* office personnel actively assisting in this litigation, or in administrative proceedings resulting from an order of this Court in this litigation, or in any remand or appeal of this matter. The Attorneys and their immediate office personnel shall neither disclose nor use any of the confidential information for purposes other than this litigation or in administrative proceedings resulting from an order of this Court in this litigation, or in any remand or appeal of this matter.

6. The Attorneys shall cause all office personnel authorized to see the confidential information to sign a statement of acknowledgement that the information is confidential and that such information will not be disclosed to anyone other than authorized personnel.

7. The Attorneys shall not make more than (5) copies of any document that is deemed "Confidential" pursuant to this Order. A record shall be maintained of each copy made, to whom they are provided and when they are returned.

8. Whenever any document subject to the protective order is not being used, it shall be stored in a locked vault, safe, or other suitable container.

9. All such copies shall be clearly marked as containing confidential information and that they are to be returned at the conclusion of this litigation.

10. If counsel for any party wishes to consult with any expert for purposes of evaluating the confidential information, and thus disclose it to such expert, leave therefore must be obtained from the Court by motion (any opposition to which must be served by express mail and filed within five days). Such experts, if approved, shall agree not to disclose the confidential information to anyone other than to the counsel who consulted with them or to that counsel's authorized office personnel, and then for purposes of this litigation only. Any expert so consulted shall first sign a statement submitting himself or herself to the jurisdiction of the U.S. Court

of International Trade and to such reasonable sanctions as this Court may deem appropriate in the event of a breach of the conditions of this order.

11. Any documents, including briefs and memoranda, containing any of the confidential information subject to this order, which are filed with the Court in this case or used for any other purpose, shall be conspicuously marked as containing confidential information which is not to be disclosed to the public, and arrangements shall be made with the Clerk of this Court to retain such documents under seal, permitting access only to the Court, Court personnel authorized by the Court to have access, and attorneys of record for the parties. Copies of all the foregoing documents, but the confidential information deleted, shall be filed with the Court at the same time that the documents containing the confidential information are filed.

12. Any briefs or memoranda containing confidential information shall be served on the other parties in a wrapper conspicuously marked on the front "Confidential" and shall be accompanied by a separate copy from which the confidential information has been deleted.

13. Upon conclusion of this litigation, the Attorneys shall return all documents containing confidential information and all copies made of such documents, including any documents or copies held by persons authorized under this order to have access thereto, except for copies which contain work notes of the Attorneys or other authorized persons, which copies shall be destroyed. The return of such documents shall be accompanied by the record required to be maintained under paragraph 7 of this Order, and a certificate executed by an attorney of record attesting that the provisions of this paragraph have been complied with in all respects.

14. Nothing herein shall be deemed to constitute any waiver by the parties of their right to contest the asserted confidentiality of any document.

15. The Attorneys shall promptly report any breach of the provisions of this Order to the Court.

Appendix—List of Documents Accessible to Intervenors Under Judicial Protective Order

The following documents in the Administrative Record to *Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, The Netherlands, Romania, the United Kingdom, and West Germany,* Inv. Nos. 701-TA-86 through 144, 701-TA-146, and 701-TA-147 (Preliminary).

	Date
a. *Confidential* Petition of U.S. Steel for Belgium, West Germany, The Netherlands, United Kingdom, Luxembourg, Brazil, Italy, Spain, and South Africa (82/01/13 757K)	82/01/11
b. *Confidential* Petition of Republic Steel, Inland Steel Corporation and Cyclops Corporation on steel products from foreign countries (82/01/15 790K).	82/01/11
c. Submission filed by Anderson of Cravath Swaine & Moore. *Confidential* being cleared 82-22. Confidential information (82/01/27 1088K).	82/01/26
d. Testimony by Stewart of Stewart. *Confidential.* Being cleared 82-24. Request for confidential treatment of business confidential information.	82/02/03
e. Post conference brief and appendix filed by Gold of Cravath, Swaine & Moore on behalf of Republic Steel Corporation. *Confidential.* (82/02/110 221L)/	82/02/09
f. Supplement filed by Stewart of Eugene L. Stewart on behalf of Armco, Inc. *Confidential.* Supplement to testimony of Armco, Inc. at the public conference Feb. 3-4, 1982 regarding hot rolled carbon and alloy bars (82/02/10 236L)	82/02/10
g. Memo Inv-F-016 filed by Fry of Director of Investigations. *Confidential* Memo Regarding Part III of the Staff Report (82/02/22 550L).	82/02/18

h. ***Producer's Questionnaires*** **(in their entirety).**

Document No.	Firm
37 (196483)	Ameron Steel and Wire Division.
38 (196484)	Ampco-Pittsburgh Corporation.
39 (196485)	Armco Inc.
40 (196487)	Atlantic Steel Company.
41 (196491)	Baron Drawn Steel Corporation.
42 (196492)	Bethlehem Steel Corporation.
43 (196502)	CF&I Steel Corporation.
44 (196511)	Cyclops Corporation.
45 (196515)	Ford Motor Co. (Steel Division).
46 (196523)	Inland Steel Co.
47 (196525)	Interlake Inc.
48 (196530)	Jones & Laughlin Steel Inc.
49 (196532)	Judson Steel Corporation.
50 (196535)	Keystone Consolidated Industries, Inc.
51 (196538)	LaSalle Steel Company.
53 (196547)	Moltrup Steel Products Company.
54 (196550)	National Steel Corporation.
55 (196553)	Northwestern Steel & Wire Co.
57 (196560)	Phoenix Steel Corp.
58 (196564), (196564) (supp.)	Republic Steel Corp.
59 (196565)	Roanoke Electric Steel Corp.
60 (196570)	Stanadyne, Inc.
61 (196578)	The Timken Company.
62 (196580)	United States Steel Corporation.

i. *Producer's Questionnaires* (Information relating to lost sales only).

Document No.	Firm
52 (196542)	Lukens Steel Company.
56 (196556)	Oregon Steel Mills.

j. *Importer's Questionnaires.*

Document No.	Firm
1 (196384)	Artco Steel Corporation.
6	C. Tennant & Sons, Inc.
9 (196457)	Delta Steel, Inc.
14 (196473)	Honsa World Cargo Service, Inc.
22 (196438)	Mitsubishi International Corp.
25 (596447)	Pan American Trade Development Corporation.
31 (196416)	Thyssen, Inc.

k. Lost sales notes of the Commission investigator (Document No. 128).

Roquette Freres and Roquette Corporation, plaintiffs *v.* United States, defendant, and Pfizer, Inc., intervenor

Court No. 82-5-00636

Before Boe, *Judge.*

Memorandum Opinion and Order To Remand

(Dated July 18, 1983)

Wald, Harkrader & Ross (*Joel E. Hoffman* and *Marilyn E. Kerst,* of counsel) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General (*David M. Cohen,* Director, Commercial Litigation Branch and *A. David Lafer; William E. Perry,* Office of the General Counsel, International Trade Commission, of counsel) for the defendant.

Barnes, Richardson & Colburn (*E. Thomas Honey,* of counsel) for the intervenor.

Rivkin, Sherman & Levy (*Saul L. Sherman* and *Lance E. Tunick*) attorneys for ICI Americas Inc., *amicus curiae.*

Boe, *Judge:* The defendant has filed a motion requesting that the above-entitled action be remanded to the International Trade Commission for a determination by said Commission in the antidumping investigation involving *Sorbitol From France* that an industry in the United States was materially injured by reason of importation of sorbitol from France being sold at less than fair value. It is further moved that all further proceedings in this action be stayed pending the determination by the ITC on remand.

From its acquaintance to date with the record of the proceedings of the ITC certified for review, this court deems that clarification of the determination of the Commission and the findings on which it is based as well as clarification of the position of the respective members who participated, indeed, is appropriate.

A candid acknowledgment by the defendant in its memorandum in support of its motion that substantial, relevant and material information contained in questionnaires was not included in the Commission's staff report nor in any manner presented to the Commission during the course of the investigation may well serve to explain the considerable variance in the findings and the resulting determinations adopted by the respective Commission members.

To allow the record herein to stand in its present form, absent the substantial relevant information that should have been included in its staff report, and to permit a judicial review of the Commission's determination and its supporting findings made upon an acknowledged incomplete record would be an intolerable miscarriage of justice and a blemish upon the review process of administrative determinations.

Now, Therefore, it is hereby

Ordered that the within action be and is hereby remanded to the International Trade Commission to consider in full all relevant information presently in its possession or which hereafter may be presented to it as to whether an industry was materially injured by reason of imported sorbitol from France being sold at less than fair value. The determination so made by the Commission shall be returned to this court within a period of sixty (60) days from the date of entry of this order.

At such time as may be deemed appropriate by the Commission and prior to the making of its final determination, all respective parties shall be permitted to be heard by the entire Commission and to submit such additional information as may be relevant and material.

Time for the submission of supplemental briefs on review, if desired by respective counsel, will be fixed by the court upon the expiration of the order relating to the stay of proceedings herein.

Upon motion by the plaintiffs, subsequent to the Commission's determination on remand but prior to submission of any briefs or argument on review, this court will again consider plaintiffs' need for access to the confidential documents presently included in the protective order of this court, and it is further

Ordered that all proceedings in the above action concerning judicial review of the final determination of the International Trade Commission, accordingly, be and are hereby stayed for a period of sixty (60) days in order to allow the Commission to make its determination on remand, and it is further

Ordered that defendant's response to plaintiffs' motion regarding the final determination of the Department of Commerce, International Trade Administration, shall be filed on or before fifteen (15) days from and after the date of this order.

Schaper Manufacturing Co., Division of Kusan, Inc., plaintiff *v.* The Honorable Donald T. Regan, Secretary of the Treasury of the United States, and The Honorable William von Raab, Commissioner of Customs, defendants, and The Milton D. Myer Company, intervenor

Court No. 83-3-00333

Before Boe, *Judge.*

Order

[Plaintiff's motion for modification of preliminary injunction, denied.]

(Dated July 19, 1983)

Plaia, Schaumberg & deKieffer (*Tom M. Schaumberg* and *Alice A. Kipel* at the oral argument) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; (*Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Deborah E. Rand* at the oral argument), for the defendants.

Buell, Blenko, Ziesenheim & Beck (*Lynn J. Alstadt* at the oral argument), for the intervenor.

Boe, *Judge:* The plaintiff having filed a motion for modification of the preliminary injunction granted in the above-entitled action by this court under date of March 21, 1983, by:

1. Requiring the U.S. Customs Service to reduce the bond covering Customs Entry 82-807044-5 to the value of the allegedly non-piratical goods;
2. Requiring Customs to return to Schaper its bonds covering Customs Entries 83-800566-6 and 83-800602-7; and
3. Enjoining Customs from liquidating Customs Entry 82-807044-5 entered at the Port of Pittsburgh, Pennsylvania, and

The court having considered the briefs submitted by respective counsel and at oral argument held on July 18, 1983, having heard the arguments of counsel, and

The court having presented orally in open court its opinion and decision with respect to plaintiff's motion which said statement of opinion and decision is a part of the official record in this proceeding and, accordingly, is made a part hereof by this reference, and

It appearing to the satisfaction of the court that:

1. No sufficient showing has been made by the plaintiff that failure to grant the modifications sought in its motion will result in immediate irreparable injury to the plaintiff, and
2. The plaintiff has failed to show wherein the modifications sought in its motion are required to preserve the status quo of

the within action as maintained by the preliminary injunction previously granted by this court, and

3. The modifications sought by the plaintiff in its present motion and over which this court has jurisdiction, are, in fact, matters constituting the very subject of this action and, accordingly, are properly determined at such time as the within cause of action is tried on the merits.

Now **Therefore**, it is hereby

Ordered that the motion of the plaintiff for modification of the preliminary injunction granted by this court under date of March 21, 1983, be and is hereby denied.

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569 F. Supp. 864

United States Steel Corporation, Republic Steel Corporation, et al., plaintiffs *v.* United States, et al., defendants, and Companhia Siderurgica Paulista (COSIPA), and Usinas Siderurgicas De Minas Gerais (USIMINAS), defendants-intervenors

Consolidated Court No. 82-10-01361

Before **Watson**, Judge.

ITA Suspension of Investigation

The Court upholds the determination by the ITA to suspend a countervailing duty investigation of carbon plate steel from Brazil based on an agreement by Brazil to use an export tax to offset the subsidies found to exist.

[Administrative determination affirmed.]

(Decided July 20, 1983)

Law Department of United States Steel Corporation (*Leslie Ranney, Peter Koenig* of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (*Joseph R. Sahid, Steven Schulman* of counsel) for plaintiffs, Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen*, Branch Director, Civil Litigation Branch; (*Velta A. Melnbrencis, Francis J. Sailer, A. David Lafer*, Attorneys, Civil Litigation Branch) for defendants United States, *et al.*

Wald, Harkrader & Ross (*William H. Barringer, Arthur J. Lafave III* of counsel) for Defendants-Intervenors Companhia Siderurgica Paulista (COSIPA) and Usinas Siderurgicas de Minas Gerais (USIMINAS).

Watson, *Judge:* In this phase of the action, plaintiffs seek judicial review of a decision by the International Trade Administration of the Department of Commerce (ITA) to suspend a countervailing duty investigation of carbon plate steel from Brazil.[1] At the time of

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[1] *Carbon Steel Plate From Brazil; Suspension of Investigation*, 47 Fed. Reg. 39,394 (1982).
The investigation was started on February 1, 1982, 47 Fed. Reg. 5,751 (1982). In March, it was determined to be "extraordinarily complicated" within the meaning of 19 U.S.C. § 1671b(c) and the preliminary determination

Continued

its suspension the investigation had preliminarily identified five subsidy programs.[2]

In particular, plaintiffs challenge the agreement between the government of Brazil and the Department of Commerce, which supplied the basis for suspending the investigation, and in which Brazil agreed to offset (by means of an export tax) the amounts determined to be subsidies.[3]

The Court has jurisdiction of the action under 19 U.S.C. § 1516a(a)(2)(A)(i). Under 19 U.S.C. § 1516a(b) the Court reviews the administrative record and is required to hold unlawful any determination not supported by substantial evidence or not in accordance with the law.

Plaintiffs allege that the ITA did not comply with the notice, consultation, and other procedural requirements of section 704(e), of the Tariff Act of 1930, (19 U.S.C. § 1671c(e)).[4] Plaintiffs also allege that the agreement does not meet the statutory requirements that it offset completely the amount of the net subsidy, that it be effectively monitorable and that it be in the public interest.[5]

After reviewing the record, reading the briefs and hearing oral argument, the Court has not been persuaded that the ITA determination to suspend the investigation was unlawful or lacking in substantial evidence. Stated differently, the Court finds that the terms of the agreement, and the manner in which it was entered into, were in compliance with the statute and support the decision to suspend the investigation.

On the procedural question the Court finds that, although things were done in a somewhat rushed manner at the last minute, the timing satisfied the law and, as a practical matter, the parties' procedural rights were not meaningfully affected.

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of whether there was a reasonable basis to believe or suspect that a subsidy was being provided was postponed. 47 Fed. Reg. 11,788 (1982). In June, a preliminary subsidy determination was made. 47 Fed. Reg. 26,310 (1982). *See* note 2 *infra*. Following the suspension challenged in this action, the investigation was continued at plaintiffs' request under section 704(g) (19 U.S.C. § 1671c(g) and resulted in a final countervailing duty determination (48 Fed. Reg. 2,568 (1983)) which, in accordance with section 704(f)(3) (19 U.S.C. § 1671c(f)(3)), left the suspension of the investigation unaffected and the agreement in force.

[2] The ITA's preliminarily determination in June found that Brazil was providing subsidies under three programs, and effective June 17, 1982, the United States Customs Service was directed to suspend liquidation of entries of carbon steel plate from Brazil and to require a cash deposit or bond in the amount of 8.58 percent of the f.o.b. value. 47 Fed. Reg. 26,310 (1982). Subsequently (in the Notice of Suspension of Investigation) a fourth program was found to be a subsidy, 47 Fed. Reg. 39,394 (1982). A fifth program (income tax exemption for export earnings) which was placed within the coverage of the suspension, was found to be in existence, but was not used by the producers during the period of the investigation. 48 Fed. Reg. 2,573 (1983).

[3] The agreement was published as *Annex* I to the Notice of Suspension of Investigation, 47 Fed. Reg. 39,395 (1982).

[4] 19 U.S.C. § 1671c(e)

(e) *Suspension of investigation procedure.* Before an investigation may be suspended under subsection (b) or (c) the administering authority shall—

(1) Notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the Commission not less than 30 days before the date on which it suspends the investigation,

(2) Provide a copy of the proposed agreement to the petitioner at the time of the notification, together with an explanation of how the agreement will be carried out and enforced (including any action required of foreign governments), and of how the agreement will meet the requirements of subsections (b) and (d) or (c) and (d), and

(3) Permit all parties to the investigation to submit comments and information for the record before the date on which notice of suspension of the investigation is published under subsection (f)(1)(A).

[5] The Court has previously held that the standard of review here is whether all of these factors are supported by substantial evidence. *United States Steel Corp., et al. v. United States,* 4 CIT 257 (1982). *See* note 8 *infra*, for text of statutory requirements.

The essentials were satisfied by telephone notifications, and explanations and delivery of copies of the agreement by July 23, 1982, which was no less than 30 days prior to the August 24th issuance of the notice of suspension.[6] The nature of the agreement was such that elaborate explanation was not needed, especially to lawyers whose minds had been developed to an extraordinary keenness by prolonged exposure to the Trade Agreements Act of 1979. In all, it can be fairly stated that no party was prevented from having its say. Although in general the ITA might be wiser to be more generous in the timing and extent of its notification and consultation procedures, the Court cannot say that its conduct was unlawful.

The Court now turns to the agreement which is at the center of this dispute. The agreement provides that the Department of Commerce (the Department) will suspend its countervailing duty investigation on the basis of Brazil's agreement to "offset completely the amount of the net subsidy determined by the Department to exist with respect to the subject product." This is to be done by means of an export tax levied on the exported steel. Brazil agrees not to substitute other benefits for those offset by the agreement and agrees to notify the Department of any changes in benefits to the products involved or in the rate of the export tax or of any decision to alter or terminate its obligations under any of the terms of the agreement. Brazil also agrees to certify at three-month intervals "whether it continues to be in compliance with the agreement by offsetting the net subsidy" and "whether it has substituted any new or equivalent benefits for the benefits offset by the agreement." Brazil further agrees to supply to the Department such information as the Department deems necessary to demonstrate that it is in compliance with the agreement and to permit such verification and data collection as is requested by the Department in order to monitor the agreement. The agreement states that the Department will request information and conduct verification under section 751, (19 U.S.C. § 1675)[7] and that if a determination is made that the agreement has been or is being violated or no longer meets the requirements of sections 704(b) or (d) (19 U.S.C. § 1671c(b) or (d)),[8] then the provisions of section 704(i) (19 U.S.C. § 1671c(i)) shall apply.[9]

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[6] A minor difference of opinion has developed between the plaintiffs and defendant-intervenors on the ques-
tion of what exactly is the date on which the ITA suspends the investigation (no less than thirty days before
which the ITA has to notify petitioners and other interested parties of its intent to suspend the investigation,
consult with petitioner and supply it with a copy of the proposed agreement and an explanation). For the pur-
pose of allowing the longest possible period for *meaningful* consultation and comment and because the period
between the actual issuance of the ITA determination and its publication cannot be considered as receptive to
change as the 30 days prior to the issuance, it is better to use the earlier date on which the ITA issues its notice
rather than the date of publication. This is taken to conform to the Congressional intent more closely.

[7] § 1675. Administrative review of determinations.

(a) *Periodic review of amount of duty.*
(1) *In general.* At least once during each 12-month period beginning on the anniversary of the date of
publication of a countervailing duty order under this title [19 U.S.C. §§ 1671 et seq.] or under section 303 of
this Act [19 U.S.C. § 1303], an antidumping duty order under this title [19 U.S.C. §§ 1671 et seq.] or a finding
under the Antidumping Act, 1921 [19 U.S.C. §§ 160 et seq.], or a notice of the suspension of an investigation,
the administering authority, after publication of notice of such review in the Federal Register, shall—
(A) Review and determine the amount of any net subsidy,
(B) Review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty,
and
(C) Review the current status of, and compliance with, any agreement by reason of which an investi-
gation was suspended,
and review the amount of any net subsidy or margin of sales at less than fair value involved in the
agreement, and shall publish the results of such review, together with notice of any duty to be assessed,
estimated duty to be deposited or investigation to be resumed in the Federal Register.

* * * * * * *

In essence, the substantive objections of plainiffs take the form of a complete rejection of the use of an export tax and the anticipation of both avoidance of the agreement by Brazil and shortcomings in the enforcement of the agreement by the ITA.

Plaintiffs argue that because Brazil owns COSIPA and USIMINAS and has a strong national interest in the encouragement of its steel industry, it is an inherently unsuitable custodian of the funds to be generated by the export tax. This argument simply indicates plaintiffs' suspicion that Brazil will try to return the export tax to the taxpayers by any means. To the extent that this argument assumes an evasive intent on the part of Brazil it cannot be entertained. The same argument would doom even the complete termination of the subsidy because the funds would still be in the hands of the Brazilian government and subject to manipulation. The good faith of the parties to these agreement must be accepted. In any event, an agreement cannot be faulted for being avoidable by deception and evasion.

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[8] **§ 1671c. Termination or suspension of investigation**

* * * * * * *

(b) *Agreements to eliminate or offset completely a subsidy or to cease exports of subsidized merchandise.* The administering authority may suspend an investigation if the government of the country in which the subsidy practice is alleged to occur agrees, or exporters who account for substantially all of the imports of the merchandise which is the subject of the investigation agree—

(1) To eliminate the subsidy completely or to offset completely the amount of the net subsidy, with respect to that merchandise exported directly or indirectly to the United States, within 6 months after the date on which the investigation is suspended, or

(2) To cease exports of that merchandise to the United States within 6 months after the date on which the investigation is suspended.

* * * * * * *

(d) *Additional rules and conditions.*

(1) *Public interest; monitoring.* The administering authority shall not accept an agreement under subsection (b) or (c) unless—

(A) it is satisfied that suspension of the investigation is in the public interest, and

(B) effective monitoring of the agreement by the United States is practicable.

(2) *Exports of merchandise to United States not to increase during interim period.* The administering authority may not accept any agreement under subsection (b) unless that agreement provides a means of ensuring that the quantity of the merchandise covered by that agreement exported to the United States during the period provided for elimination or offset of the subsidy or cessation of exports does not exceed the quantity of such merchandise exported to the United States during the most recent representative period determined by the administering authority.

* * * * * * *

[9] (i) *Violation of agreement.*

(1) *In general.* If the administering authority determines that an agreement accepted under subsection (b) or (c) is being, or has been, violated, or no longer meets the requirements of such subsection (other than the requirement, under subsection (c)(1), of elimination of injury) and subsection (d), then, on the date of publication of its determination, it shall—

(A) Suspend liquidation under section 703(d)(1) [19 U.S.C. § 1671b(d)(1)] of unliquidated entries of the merchandise made on or after the later of—

(i) The date which is 90 days before the date of publication of the notice of suspension of liquidation, or

(ii) The date on which the merchandise, the sale or export to the United States of which was in violation of the agreement, or under an agreement which no longer meets the requirements of subsections (b) and (d) or (c) and (d), was first entered, or withdrawn from warehouse, for consumption,

(B) If the investigation was not completed, resume the investigation as if its affirmative preliminary determination under section 703(b) [19 U.S.C. § 1671b(b)] were made on the date of its determination under this paragraph,

(C) If the investigation was completed under subsection (g), issue a countervailing duty order under section 706(a) [19 U.S.C. § 1671e(a)] effective with respect to entries of merchandise the liquidation of which was suspended, and

(D) Notify the petitioner, interested parties who are or were parties to the investigation, and the Commission of its action under this paragraph.

(2) *Intentional violation to be punished by civil penalty.* Any person who intentionally violates an agreement accepted by the administering authority under subsection (b) or (c) shall be subject to a civil penalty assessed in the same amount, in the same manner, and under the same procedure, as the penalty imposed for a fraudulent violation of section 592(a) of this Act [19 U.S.C. § 1592(a)].

To the extent that this argument relies on a legal objection to the use of export-tax offsets when the exporter is owned by the government, the argument is not supported by the law. The language of the statute does not make that distinction, the legislative history does not suggest it, and the force of logic does not require it. The law respects the separation of corporations from their stockholders unless there is good reason to find otherwise. In this context, reason means factual support, not motive alone. The genuineness of the separation between the corporation and the government stockholder and the bona fides of transactions between them is for the ITA to decide. Those decisions will be upheld unless they are lacking in substantial evidence or legally deficient.

There is no doubt that if an export tax had been in place prior to the investigation, the offset would have reduced the amount of the gross subsidy. That would have been the result of the application of section 771(6)(C) (19 U.S.C. § 1677(6)(C)) in which export taxes specifically intented to offset the subsidy received are listed as deductions.[10] It is therefore difficult to comprehend why such offsets should not figure prominently among the offsets which justify suspension of the investigation under section 704(b) (19 U.S.C. § 1675(b)).

Finally, the existence of state-owned corporations in free market economies it too well to believe that Congress intended special treatment for them without mentioning it, specifically to preclude the use of offsets. Congress was not hesitant to provide differential treatment for special situations involving multinational corporations and enterprises operating in state-controlled economies under the Antidumping Act of 1921, as amended, 19 U.S.C. § 1677b (c) and (d). In sum, we do not have here a self-evident flaw or definite anomaly in the law which has to be interpreted away reference to a larger and overriding measure of Congressional intention.

Plaintiffs also complain that the agreement does nothing to prevent the return of the export tax to these companies by means of equity infusions, i.e., government purchases of stock. Plaintiffs point out that the ITA has already determined in this investigation that certain equity infusions were not subsidies.[11] Nevertheless, it still remains within the authority of the ITA to find, under this agreement, that future infusions have the practical effect of providing a benefit which substitutes for the subsidies offset by the agreement.[12] This involves the provision in the agreement in which Brazil agrees not to provide substitute benefits and leads into a discussion of plaintiffs' related objections.

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[10] 19 U.S.C. § 1677

(6) *Net subsidy*. For the purpose of determining the net subsidy, the administering authority may subtract from the gross subsidy the amount of—

(A) Any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,

(B) Any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(C) Export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

[11] That determination is under judicial review in another phase of this action.

Plaintiffs have fixed on the ban on "substitute" benefits as a sign of the agreement's failure to accomplish the statutory objectives because it does not reach all "new" subsidies and involves the ITA in impossible detection and determination of the intent of future benefits.

When the agreement states its coverage of "substitute" subsidies it goes exactly as far as it has to go under the law, and probably as far as it can go. If the agreement purported to bar all future subsidies it might be an unjustified interference with the right of a country to subsidize, which is recognized in the Agreement on Interpretation and Application of Articles VI, XVI, and XXXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures), approved under section 2(a) of the Trade Agreements Act of 1979 (19 U.S.C. § 2503(a)).

When the agreement speaks to substitute subsidies, it must refer to those later benefits which have the practical effect of restoring offset subsidies in whole or in part. Lack of intent to substitute is irrelevant, so plaintiffs' concern with the agency necessarily becoming involved in the intricacies of determining intent is excessive. The decision as to what is or is not a substitute is for the ITA to make and, while it is impossible to predict all the factors which may enter into such a decision, it is safe to say that the agreement insures that the ITA will have sufficient data to make an informed decision.

Plaintiffs' further concern that the agency will not be able to detect benefits which Brazil does not report is not a defect of monitoring. That would be a plain violation of the agreement which is not to be assumed. In addition, the ITA's general investigatory powers have to be considered sufficient to find such violations, if they occur, and respond appropriately. The provisions for monitoring are sufficient to allow the ITA to receive or demand all the information it needs to perform its duties and the proper performance of those duties is presumed.

Plaintiffs have forcefully conveyed their lawyerly premonitions of disaster. They have presented a number of scenarios in which various substituted or increased benefits escape being offset even when the ITA is informed about them. According to plaintiffs, it is possible for Brazil to anticipate the offset much as a donor can anticipate a gift tax and include it in the gift. In the opinion of the Court, the normal and proper operation of this agreement will not permit such or similar avoidances because the export tax does not remain a predictable constant. It must be adjusted promptly and accurately to reflect changes in benefits. Under the agreement, the ITA should have the information needed to accomplish adjustment and the agreement contemplates that it will be done expeditiously.

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[12] In the final determination referred to in note 1 *supra*, the rebate of a value-added tax under Decree Law 1547, which eventually enlarged the government's equity share of the producers, was found to be a subsidy. 48 Fed. Reg. at 2,570 (1983).

Beyond all this, if disputes arise as to whether certain benefits are substitutes for offset subsidies or whether the export tax is being properly adjusted, the possibility of judicial review may be foreseen in appropriate circumstances.

The Court also holds that there was substantial evidence to find that the suspension of this investigation was in the public interest. This can be expected to be the norm if the agreement satisfies the statutory criteria and no other important considerations have been overlooked.

In sum, the Court is of the opinion that this agreement cannot be avoided short of outright deception, incompetence or unlawful conduct—none of which can be assumed, and all of which are likely to be remediable administratively or judicially. The agreement leaves plaintiffs as secure as they can be in a changing world.

For these reasons, the Court finds that there was substantial evidence for the ITA's determination to suspend its investigation of carbon steel plate from Brazil. Its conduct was lawful and the agreement it entered into complied with the requirements of the law. Accordingly, the ITA's determination to suspend the investigation is affirmed.

ALSTHOM ATLANTIQUE & COGENEL, INC., PLAINTIFF v. UNITED STATES, DEFENDANT, WESTINGHOUSE ELECTRIC CORPORATION, DEFENDANT-INTERVENOR

Court No. 82-4-00474

Before RAO, *Judge*.

Memorandum Decision and Order

(Dated July 21, 1983)

Donohue and Donohue (John M. Peterson on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*A. David Lafer* on the brief) for the defendant.

Steptoe & Johnson (Valerie Amy Slater on the brief) for the intervenor.

RAO, *Judge:* Plaintiffs, Alsthom Atlantique and Cogenel, Inc., have moved for an order, pursuant to CIT Rule 56.1, that the above-entitled action be submitted for determination by a motion for review of the administrative determination on the agency records and asks that the defendants be required to serve and file their responses to plaintiffs' motion papers and brief no later than 30 days following the service and filing of plaintiffs' motion papers and brief, *inter alia*.

The United States, defendant, has asked the court to allow it 60 days to respond to plaintiffs' motion, which will be dispositive of the issues involved in this action. It indicates that it will not be able to prepare a complete response to the motion and brief in the 30 days provided for in Rule 56.1(b) of this court.

Westinghouse Electric Corporation, Intervenor, also opposes the briefing schedule proposed by the plaintiffs, and also requests 60 days to respond to the motion. It reiterates the reasons set forth by the defendant, United States.

The language of Rule 56.1(b) is mandatory in that it provides that a response shall be made within 30 days after service of the motion for review on the basis of the record made before the agency. We note however, that pursuant to Rule 6(b) the court may, on motion, extend the period of time for an act required by the rules for good cause shown. The defendant and the intervenor are anticipating that they will not be able to respond to the motion and the supporting briefs. We believe that these positions are inappropriate and not well taken at this time. Should the defendant and the intervenor, after they have been served with plaintiffs' motion and brief, find that they can not, for good cause, respond within the time prescribed by Rule 56.1, they can then move for an extension of time within which to respond.

Plaintiffs take the position that the defendant's and intervenor's oppositions to their motion constitute a cross-motion for an extension of time and for leave to file reply briefs. Neither the United States nor Westinghouse in their responses request or refer to reply or sur-reply briefs, although the proposed orders submitted to the court provide for them. It is the opinion of this court that these do not constitute cross-motions for leave to file sur-reply briefs and the court does not decide whether such briefs are proper, necessary or appropriate in this action. It is therefore,

ORDERED, that plaintiffs' motion be granted; and that this action shall be submitted for determination as prescribed by Rule 56.1; and it is further

ORDERED, that plaintiffs serve and file their motion papers and brief no later than 20 days after the date of this Order; and it is further

ORDERED, that defendants serve and file their responses to plaintiffs' motion papers and brief no later than 30 days following service and filing of plaintiffs' motion papers and brief; and it is further

ORDERED, that plaintiffs serve their reply brief within 10 days after service and filing of defendants' response.

PPG INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-9-01273

Before RAO, *Judge.*

On Plaintiff's Motion for Review Upon Agency Record, Defendant's Motion for Partial Summary Judgment and Cross-Motion for Remand and Plaintiff's Response to Defendant's Cross-Motion for Remand

[Defendant's cross-motion for remand granted.]

(Dated July 21, 1983)

Eugene L. Stewart (Terence P. Stewart, Jeffrey S. Beckington and *Roger Yochelson* with him on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Justice Department *(Sheila N. Ziff* on the brief) for the defendant.

RAO, Judge: This civil action was brought by plaintiff, an American manufacturer of clear sheet glass, to contest the final determination by the United States Commerce Department (Commerce) in its first annual review of a dumping finding with respect to clear sheet glass from Taiwan.

The original dumping finding had been made and published in 1971 by the United States Treasury Department (Treasury) which administered the antidumping laws of this country prior to the issuance of Executive Order No. 12188, January 2, 1980 (45 Fed. Reg. 993) which transferred this function from Treasury to Commerce. In its first annual review, Commerce concluded that there had been no shipments of clear sheet glass from Taiwan to the United States during the period covered by the review (July 1, 1979 through July 31, 1980). As a result, Commerce used the weighted average margins from Treasury's master list covering the period July 1, 1974 through June 30, 1976, without further investigation.

The original investigation had concerned two manufacturers or exporters of clear sheet glass to the United States: Hsinchu Glass Works, Inc. (Hsinchu) and Taiwan Glass Corporation (Taiwan Glass). Taiwan Glass ceased its exportation of the merchandise to the United States in 1976. Hsinchu made two shipments of clear sheet glass to the United States in September 1979. These shipments were not considered by Commerce in its annual review and Commerce published its final results of the administrative review on the basis of the master lists from Treasury.

Commerce concedes that it should have considered the two shipments of clear sheet glass from Taiwan in September 1979 in deciding what constituted the best information available to it as the basis for its determination of the dumping margins (See 19 U.S.C 1677) and asks that the matter be remanded so that it may revise its calculations, if necessary, and issue a redetermination.

Plaintiff agrees that the matter should be remanded and asks the court to direct Commerce with respect to the reconsideration as to the following procedural concerns:

(1) That the correct period of review be designated by the Court to be July 1, 1976 through July 30, 1980

(2) That Hsinchu be required to report all its exports of clear sheet glass to the United States for that period to the extent that it has not done so previously

(3) That this court direct Commerce to base its determination on the actual shipments reported by Hsinchu for the revised period of review, and

(4) That the plaintiff be permitted to participate in the remand proceedings through disclosure of confidential information, a disclosure conference and a hearing. Plaintiff also seeks an opportunity to amend its complaint if necessary within thirty days from the date of the redetermination.

This court cannot give plaintiff access to confidential information in a remand of a first annual review of a dumping finding. Section 751(2) of the Trade Agreements Act of 1979 expressly prohibits the administering authority from revealing confidential information in an annual review and we cannot enlarge plaintiff's rights of disclosure beyond the congressional grant. However, plaintiff will be granted participation in a hearing if it requests one of Commerce under section 751(d)

> (d) Hearings.—Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 774(b) in connection with that review.

The Legislative History (Volume 2, page 429) of the Act demonstrates that Congress intended participation in the annual review by interested parties both orally and in writing:

> The Authority shall afford interested parties an opportunity to comment on the proposed determination and publish the determination of revised net subsidies or margins of dumping in the Federal Register, including the bases for the assessment of duties on the merchandise included within the determination. (statute)
>
> * * * * * * *
>
> Whenever the Authority or the Commission conducts a review, it shall, upon the request of any interested party, permit the presentation of written and oral views in connection with that review. (statute)

Plaintiff also requests that Commerce be directed to designate the period of review as being from July 1, 1976 through July 30, 1980 and that Hsinchu be required to report all its exports of clear glass to the United States during that period. This court considers such a directive unnecessary in view of the statutory language of the Act that requires the administering authority to consider every entry subject to the original final determination and determine the amount, if any, by which the foreign market value of each such entry exceeds its United States price. Section 751(2) (A) and (B) of the Act. We shall not presume that Commerce does not understand its duties under the statute and how the dumping margin is to be determined.

It is, accordingly,

ORDERED, that this matter be, and the same here is remanded to the Department of Commerce for a reconsideration of the annual review of clear sheet glass from Taiwan, consistent with this opinion, and it is further

ORDERED, that plaintiff's motions for remand with instructions be and the same hereby is denied, and it is further

ORDERED, that upon completion of the agency redetermination, plaintiff shall have the opportunity to amend its complaint in light of the agency's redetermination within thirty days from the date thereof.

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569 F. Supp. 870

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS v. UNITED STATES, ET AL., DEFENDANTS AND HIGHVELD LIMITED, COMPANHIA SIDERURGICA PAULISTA (COSIPA), AND USINAS SIDERURGICAS DE MINAS GERAIS (USIMINAS), DEFENDANTS-INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Memorandum Opinion and Order on In-House Counsel Access to Confidential Business Information

The Court decides not to grant access to business confidential information to in-house counsel for United States Steel Corporation.

[Motion for access denied.]

(Decided July 22, 1983)

Law Department of United States Steel Corporation (D.B. King, J.J. Mangan, C.D. Mallick, L. Ranney and *P.J. Koenig* of counsel) *for plaintiff United States Steel Corporation.*

Cravath, Swaine & Moore (Joseph R. Sahid and *Steven Schulman* of counsel) for plaintiffs, Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch *(A. David Lafer* and *Francis J. Sailer,* attorneys, Commercial Litigation Branch) for the federal defendants.

Wald, Harkrader & Ross (William H. Barringer, Christopher A. Dunn and *Arthur J. Lafave III* of counsel) for defendants-intervenors COSIPA and USIMINAS.

Watson, *Judge:* In this opinion, the Court answers the difficult question of whether to allow in-house or corporate counsel to have access to confidential information regarding the business of their employer's competitors. The question was raised in *United States Steel Corp.* v. *United States,* Consolidated Court No. 82-3-00288; but the settlement of the steel dispute with the European Community made the issue moot.[1] Now the issue has been raised once more in this motion [2] by U.S. Steel for access to the business confidential portions of the record. These are portions of the record of the final countervailing duty determinations on carbon plate steel from South Africa [3] and Brazil.[4] To the extent that it claims that these determinations were not supported by substantial evidence, there is no doubt that U.S. Steel has a need for access.

There is also no question that the information sought contains confidential business data of U.S. Steel's competitors in South Africa and Brazil, and could cause significant harm to them if used outside this judicial review. An *in camera* examination by the Court was sufficient to show that this information contains revealing financial, production, and sales data.

The statute which governs this dispute is part of the law which provides for judicial review on the administrative record. At 19 U.S.C. § 1516a(b)(2)(B) it provides as follows:

> (B) *Confidential or privileged material.*—The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

This provision has been held to require the normal balancing test which courts make between the need for the information and the need for maintenance of confidentiality. *Connors Steel Co.* v. *United States,* 85 Cust. Ct. 112, C.R.D. 80-9 (1980). *Roquette Freres* v. *United States,* 4 CIT 239 (1982).

In this case, the test is complicated by the fact that disclosure is requested for in-house counsel, the only ones who have been representing U.S. Steel in these matters. The Court has previously shown a reluctance to release confidential business information to the in-house counsel of competitors. It expressed this reluctance briefly in *Atlantic Sugar Ltd.* v. *United States,* 85 Cust. Ct. 133, C.R.D. 80-18 (1980) when it stated as follows:

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[1] At the request of U.S. Steel, its memorandum of August 6, 1982, the brief of *amicus* Corporate Counsel of August 9, 1982 and the transcript of the oral argument held on August 19, 1982, all from Court No. 82-3-00288, have been incorporated in this record and reviewed by the Court.

[2] U.S. Steel points out that it merely proposed an order in response to a motion for a protective order with regard to documents designated as "business confidential" in the administrative record, which was filed by the government in February. In any event, the issue of access for in-house counsel has been raised and fully briefed.

[3] 47 Fed. Reg. 3,379 (1982).

[4] 48 Fed. Reg. 2,568 (1983).

> The court is of the opinion that in actions such as these the confidential business information of business competitors should not be disclosed to in-house counsel unless a party has no other reasonable way of adequately preparing and presenting its arguments. This preference is not based on any reservation as to the integrity of in-house counsel but is intended to avoid placing them under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working relations.

At this time the Court, in the necessary exercise of its descretion, has to extend its reasoning to in-house counsel for U.S. Steel. This carries with it the conclusion that in the present circumstances the retention of outside counsel remains a reasonable way for U.S. Steel to satisfy its need for this information.

It is only because the Court sees this information as having ineradicable importance that it takes this step. In the combination of its detail, and its scope, the information is extremely potent. Its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category. When the Court said in *Atlantic Sugar* that it was acting out of a desire to avoid placing lawyers under an unnatural and unremitting strain, it was really expressing its rationale indirectly and incompletely as a form of solicitude for the lawyers. The direct and complete reason is that, in the Court's judgment, it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship.

Obviously, this judgment can also apply to retained counsel in certain situations. It is impossible, however, to extend this reasoning to its logical conclusion and still have adversary proceedings and judicial review as contemplated by 19 U.S.C. § 1516a(b). So the distinction between in-house counsel and retained counsel is made because with respect to the former, a closer and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship. It follows that a meaningful increment of protection can be obtained by excluding in-house counsel.

The Court's rationale has absolutely nothing to do with the possibility of deliberate disclosure of this information. The integrity of counsel for U.S. Steel is unquestioned and their unblemished record of adherence to protective orders is acknowledged.

The Court also accepts the representation that in-house counsel herein do not have direct involvement in pricing or other competitive decision-making. Nevertheless, the Court's concerns arise more from counsel's general position in the corporate environment than their specific duties. If they are somewhat isolated, it is still within a rather worldly cloister. In addition, the Court has to make some reasonable assumptions that they will move into other roles and functions and that the compartmentalization of this information will become even more difficult.

The Court simply sees a greater likelihood of inadvertent disclosure by lawyers who are employees, committed to remain in the environment of a single company. The factor of permanent employment by one company is a rational means by which to distinguish between lawyers. It is not a perfect distinction; but it is a reasonable one. It does not result in an elimination of risk; but it does offer a significant increase in protection.

It resembles the precautions taken in the manufacture, transportation, use, or storage of highly dangerous substances. The consequences of an accident are thought to be so catastrophic that steps which might ordinarily appear excessive, or burdensome, or which add only a modest incremental measure of safety, are justified.

We are concerned here not with physical safety upon which lives depend, but with the safety of information upon which livelihoods depend. The rationale is the same. The greater the dangerous potential of the substance involved, the greater the caution with which it must be handled.

The Court has found no persuasive precedent to suggest that release to in-house counsel is advisable. First of all, in the eyes of the Court, the magnitude of the information involved here distinguishes this situation immediately from the cases in which in-house counsel were permitted access to the confidential information of competitors. Furthermore, there are other distinctions.

The case with the closest factual pattern involved a Federal Trade Commission investigation under 15 U.S.C. § 45 in which detailed cost information for a number of products of a cereal manufacturer were released to counsel for competitors without being limited to retained counsel. *F.T.C.* v. *J. R. Lonning,* 539 F.2d 202, (D.C. Cir. 1976). In that case the terms of the protective order of the administrative judge were affirmed by the District Court and that was found not to be an abuse of discretion. However, the release to in-house counsel appears to have been more the result of a failure by the manufacturer to keep asserting its argument for limitations before the administrative judge than a reasoned necessity. 539 F.2d at 210 and 211. In any event, the decision does not offer a guide to the exercise of judicial discretion in such matters but simply the approval of a single, opaque exercise of discretion.

The release of confidential information to in-house counsel in *Baxter Travenol Laboratories Inc.* v. *Lemay,* 89 F.R.D. 410 (D.C.S.D. Ohio, 1981) was based on the court's satisfaction that *active misuse* of the material would not occur. That court's concern was satisfied by a decision that the attorney in question could be expected to maintain a differentiation between proper use in the litigation and improper use for other business purposes. From the opinion, it appears that the improper business purpose which most concerned the objecting party was the allegedly anticompetitive litigation in which the access dispute was arising. On this point the Court was dealing primarily with a claim of unfair competition by means of litigation, rather than the prospect of misuse of confidential information in the normal competitive arena. In any event, the Court was evidently not concerned with inadvertent disclosure. Moreover, this Court does not believe that the information involved here can be so easily differentiated and compartmentalized.

The Supreme Court's refusal to make distinctions between corporate attorneys and outside counsel in *Upjohn Co.* v. *United States*. 449 U.S. 383 (1981) does not provide guidance for this situation. That decision established that the relationship between in-house counsel and the corporate client carries with it the normal privilege protections for the client's communications. It has nothing to do with the risks involved in the access to confidential information of other corporations or the proper distinctions that may be made in those cases.

None of these cases provide a persuasive rationale for not taking the most conservative measures to safeguard highly confidential information. It is also noteworthy that we are speaking of an area in which confidentiality has been a stated concern of Congress and the maintenance of confidentiality has been specifically provided for in the law.

The Court does not believe that its ruling infringes on Constitutional rights. It has difficulty conceiving of the right of a particular lawyer to participate in a case, or the right of a person to choose a particular lawyer, as being superior to the right of a party to have its confidential information meaningfully protected in litigation.

There is no shortage of cases in which in-house counsel have been denied access to confidential information. *See F.T.C.* v. *Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980) and cases cited therein. It seems that each court must grapple with this problem in the light of its own evaluation of the information involved, the risks presented and the possible consequences.

In making this ruling, and in the exercise of its discretion, the Court relies on its own evaluation of the risks of disclosure. It does not rely on the fears of respondents in the administrative proceedings that their confidential information may be used improperly or on the related concern of the agencies that important sources of information for informed decision-making will refuse to fully cooperate. Those from whom the agencies request information should comply with the requests and trust to the measured protections provided by law. As stated previously, the Court's concern here is solely with the greater risk of *inadvertent* disclosure within the corporate setting.

For the reasons given above, the Court will not grant access for in-house counsel to the requested business confidential information set out in the proposed order of United States Steel Corporation and their motion is **DENIED**.

569 F. Supp. 877

MANUFACTURE DE MACHINES DU HAUT-RHIN, PLAINTIFF *v.* WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE and INTERNATIONAL ARMAMENT CORP., DEFENDANTS

Before CARMAN, *Judge.*

Court No. 83-2-00286

Memorandum

[Motion to dismiss granted.]

(Dated July 25, 1983)

Klein & Vibber, (Arthur O. Klein & Thomas A. Gallagher on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Michael P. Maxwell* on the motion) for the federal defendants.

Crowell & Moring, (*Peter B. Work* on the motion) for the defendants.

CARMAN, *Judge:* This matter is before me on plaintiff's motion for a preliminary injunction and federal defendants' cross-motion to dismiss. Defendant, International Armament Corporation ("Interarms") has responded to both motions.

The issues presented by these motions include whether this court has jurisdiction either pursuant to 28 U.S.C. § 1581(h), 28 U.S.C. § 1581(i) or 28 U.S.C. § 1585 (Supp. IV 1980) and if jurisdiction does exist whether or not the elements necessary for a preliminary injunction are present.

This action contests a ruling by the United States Customs Service ("Customs"), excluding from the United States, pistols manufactured by plaintiff, Manufacture de Machines du Haut-Rhin ("Manurhin"), which held the imprint of the words "LIC. EXCL. WALTHER" and "LIC. WALTHER PP" infringed upon Walther trademarks owned by defendant Interarms.

Carl Walther, Gmbh ("Carl Walther"), a German manufacturing firm, registered in 1925 its "WALTHER IN DESIGN" trademark in Germany. In the early 1930's, it became the registered owner of the United States trademark "WALTHER IN DESIGN". Pistols manufactured by Carl Walther bearing the trademark gained a reputation for high quality, reliability and performance.

Carl Walther lost its production facilities after World War II and was unable to continue manufacturing pistols. As a result of this loss of production capability, Carl Walther licensed Manurhin to manufacture "WALTHER PP and PPK" pistols according to Walther specifications. Manurhin has continued to manufacture the pistols without interruption pursuant to similar license renewal agreements. The most recent license renewal was in 1982 for a term of five years.

Interarms has for twenty years been an importer of Walther firearms. Although the facts are not entirely clear, it seems Interarms obtained, in 1969, a representative agreement from Carl Walther to distribute Walther firearms in the United States. In 1977, Interarms apparently secured from Carl Walther a license for 15 years with an automatic extension of 10 years for the exclusive right to manufacture and distribute "PP, PPK and PPK/S" type Walther pistols in North America. The license agreement purportedly granted Interarms the exclusive right to import and distribute all other Walther firearm products in the United States.

Carl Walther assigned in 1981 its trademark "WALTHER IN DESIGN" Reg. No. 303,701, to Interarms. The trademark was recorded with Customs for import protection effective November 2, 1981.

The Customs Service, acting in February, 1982 pursuant to section 526 of the Tariff Act of 1930, 19 U.S.C. § 1526 (1976 & Supp. III 1979),[1] detained two small shipments of pistols marked "LIC. EXCL. WALTHER." These pistols were manufactured by Manurhin. Manurhin was not the importer. The pistols were imported by two companies, EJK Devco, Inc., and Heckler and Koch.

Customs decided in June, 1982, that the terms "LIC WALTHER PP" and "LIC. EXCL. WALTHER" had no trademark significance and appeared on the pistols in question merely to indicate that the patent holder had licensed Manurhin to manufacture and sell pistols under their patent rights. The Customs decision expressed the opinion that the name "WALTHER" was a trade name usage rather than a trademark, and noted the presence of the Manurhin (water wheel) trademark in a prominent location on the pistols.

Carl Walther assigned to Interarms the U.S. trademark "Walther", Reg. No. 1,120,867, which was then duly recorded on July 14, 1982, with Customs for import protection.

Interarms asked Customs to reconsider its June, 1982 decision which found the terms "LIC. WALTHER PP" and "LIC. EXCL. WALTHER" had no trademark significance. Customs upon reconsideration found, on January 20, 1983, that since Interarms was the owner in the United States of the trademark "WALTHER" and had recorded both the "WALTHER" and "WALTHER IN DESIGN" trademarks with Customs for import protection, that pistols bearing the words "LIC. EXCL. WALTHER" and "LIC. WALTHER PP" should be prohibited from entry into the United States. The reconsideration decision observed that the manner and number of times the term "WALTHER" was used on the pistols was evidence that the term was being employed in a trademark sense to associate the pistols with Walther and not merely in a descriptive sense to indicate the pistols were manufactured under a license granted by Walther to Manurhin.

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[1] Section 526 provides:

* * * it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

Manurhin filed an action in November, 1982, in the United States District Court for the Eastern District of Virginia, challenging Interarms' trademark rights in the name "WALTHER". The action was dismissed without prejudice.[2]

Manurhin filed this action demanding declaratory judgment relief. Manurhin requested this court find that defendant Interarms could not register the trademark "WALTHER" and "WALTHER IN DESIGN" because the assignment from Carl Walther (not a party in this action) to Interarms did not transfer ownership in the marks to Interarms. Defendant Interarms filed an answer and a counterclaim. The counterclaim requested this court to enjoin Manurhin from dealing in merchandise bearing the same mark or any mark confusingly similar to either of the Walther trademarks. Manurhin moved subsequently for a preliminary injunction. The federal defendants cross-moved to dismiss. Interarms responded to both motions.

JURISDICTION

Although a variety of issues have been presented, the threshold question, raised by federal defendants' motion to dismiss, is whether or not this court has jurisdiction to review the ruling of Customs.

When a jurisdictional issue is raised, the burden rests on the plaintiff to prove that jurisdiction exists. *United States* v. *Biehl & Co.*, 3 CIT 158, 160, 539 F. Supp. 1218, 1220 (1982).

Plaintiff argues that the court has jurisdiction pursuant to 28 U.S.C. § 1581 (h) and (i), and 28 U.S.C. § 1585 (Supp. IV 1980). Defendants contend that none of the above sections confer jurisdiction upon the court and judicial review should be entertained pursuant to section 1581(a), after plaintiff has exhausted its administrative remedies. It is with this general argument of the defendants that the court agrees. A discussion of each assertion of jurisdiction follows.

28 U.S.C. § 1581(h)

Plaintiff contends that it should not be required to exhaust its administrative remedies in the traditional sense by completing an import transaction, filing a protest and contesting the denial of the protest. Plaintiff asserts, although not alleged in the complaint, that the court has jurisdiction pursuant to section 1581(h) and the traditional method of obtaining judicial review should be circumvented because it will suffer irreparable harm if further delay is encountered. Subsection (h) of section 1581 provides:

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[2] Plaintiff sought a declaratory judgment as well as an injunction preventing defendant Interarms from petitioning the Customs Service to bar the import of pistols manufactured by plaintiff bearing the "WALTHER" mark. The action was dismissed without prejudice in the United States District Court.

> * * * The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

It is clear that section 1581(h) grants this court jurisdiction to review pre-importation rulings under limited circumstances where an importer may suffer irreparable harm if he is unable to obtain judicial review of a ruling until a contemplated transaction is completed, the duties are paid and a suit is commenced.[3] In the case at hand, the determination made by Customs was not a pre-importation ruling, since the goods in question were detained when there was an attempt to import them. Furthermore, plaintiff has not demonstrated that it would suffer irreparable harm as contemplated by section 1581(h).

The irreparable harm contemplated by section 1581(h) is the harm that may be visited upon an importer by requiring the importation of merchandise and requiring the importer to go through the administrative process of protesting its exclusion. The harm argued by Manurhin is harm resulting from the exclusion of merchandise—lost profits, lost opportunities to make agreements for sale of its product, lost goodwill, and tarnished good name. See affidavit of Daniel Chovet.[4]

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[3] H.R. Report No. 1235, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 3758 stated as follows:

Subsection (h) of proposed section 1581 is also a new grant of subject matter jurisdiction to the Court of International Trade. It provides that the court may review "prior to the importation of the goods involved," a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury regarding such issues as the classification, valuation, or rate of duty of those goods. At present, judicial review of a ruling can be obtained only by completing an import transaction in accordance with the ruling and then proceeding to obtain judicial review in the usual manner, that is filing a protest, paying the duties and contesting the denial of the protest.

The Committee recognizes that in certain instances a person can be injured if he is unable to obtain judicial review of a ruling by the Secretary of the Treasury unless and until the contemplated transaction is completed, the duties are paid and a suit is commenced in the Customs Court. Thus, it may be appropriate in limited circumstances to permit judicial review prior to the completion of the transaction or payment of the duties. Many of the witnesses who testified before the Subcommittee agreed, including the Departments of Justice and the Treasury.

The time-honored rule is that the court does not possess jurisdiction to review a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury unless it relates to a subject matter presently within the jurisdiction of the United States Customs Court, for example, an action brought pursuant to section 515 of the Tariff Act of 1930. The Committee intends a very narrow and limited exception to that rule. The word "ruling" is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction. In determining the scope of the definition of a "ruling," the Committee does not intend to include "internal advise" or a request for "further review", both of which relate to completed import transactions.

[4] The affidavit of Mr. Chovet sets forth some general background and the good reputation of Manurhin as a manufacturer. Mr. Chovet stated that American companies have expressed an interest to sell WALTHER pistols

Continued

In addition to the court finding Mr. Chovet's arguments highly speculative, the harm addressed was not that of importing merchandise and going through the administrative process, but rather the possible harm of the exclusion. To permit the plaintiff to use section 1581(h) as requested, would circumvent the system of review Congress created and use section 1581(h) in a way that was not intended by Congress. Section 1581(h) is generally to be applied on occasions where an importer can show that it should be granted an anticipatory ruling from Customs in order to avoid incurring irreparable harm in connection with the commencement of an import transaction. Plaintiff in this case has not attempted to import nor has it made a showing that such an import would present any special or particularly difficult problems.

As the federal defendants point out, the legislative history further reveals the limited application of section 1581(h), see footnote 3. Furthermore, since the legislative history concerning the meaning of the word "irreparable" appears silent, it is useful to examine its plain meaning in broad equitable terms. Irreparable injury has been defined as follows:

> * * * This phrase does not mean such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other, and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included.

Black's Law Dictionary 706–707 (5th ed. 1979.)

It is clear that it was not the intent of Congress to allow review prior to an import without the showing of exceptional circumstances required by section 1581(h). Absent these exceptional circumstances, the traditional methods of obtaining judicial review must be employed. There has been no showing that Manurhin does not have the ability to import a test shipment of pistols and file a protest against any adverse decision by Customs. The irreparable injury alleged by Manurhin is not the type of injury which section 1581(h) was intended to avoid.[5]

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manufactured by Manurhin in the United States; however, these negotiations were not followed through because of the agreement with Interarms. Mr. Chovet asserted that because of the January 1983 Customs Service ruling, Manurhin cannot conclude any possible commercial contracts with American firms. However, Mr. Chovet did not name any American companies or state that the actual completion of any contracts were pending.

Mr. Chovet further stated that "since American companies can no longer buy the United States WALTHER pistols marked 'MANURHIN LIC. EXCL. WALTHER' or 'MANURHIN LICENSE WALTHER,'" these companies, and in particular their American purchasing agents, may think that MANURHIN is, or has, become an infringee, a pseudomanufacturer or a bad manufacturer of WALTHER pistols.

[5] It is noted here that plaintiff's assertion of jurisdiction under section 1581(h) is inconsistent with its request for a preliminary injunction since subsection (h) only provides for declaratory relief.

II

28 U.S.C. § 1581(i)

It is further asserted by the plaintiff that section 1581(i) provides this court with jurisdiction. Subsection (i) of section 1581 reads as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) Revenue from imports or tonnage;
>
> (2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than protection of the public health or safety; or
>
> (4) Administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

With respect to the claimed jurisdiction under 28 U.S.C. § 1581(i) (Supp. IV 1980), it must be first noted that section 1581(i) cannot be used to circumvent the procedures set forth by section 1581(a). See *United States* v. *Uniroyal*, 69 CCPA 179, 687 F.2d 467 (1982). *Uniroyal*, the court specifically stated that "The jurisdiction of the Court of International Trade under § 1581(i) is expressly 'in addition to the jurisdiction conferred * * * by subsections (a)–(h),' and that the legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest." 687 F.2d at 472.

The administrative procedure applicable in the case at hand is triggered by a Customs exclusion of an importer's merchandise at point of entry. At that point, the importer can protest the exclusion.[6] If Customs denies the protest, judicial review may occur pursuant to 28 U.S.C. § 1581(a) (Supp. IV 1980).[7]

Plaintiff has never attempted to import merchandise and consequently has never had any merchandise excluded. There has been no showing that plaintiff cannot import a small shipment of the pistols in question, file a protest upon exclusion, and exhaust its administrative remedies.

This court has subject matter jurisdiction under section 1581(i) of a cause of action, which might otherwise be available under section 1581(a), only when the relief available under section 1581(a) is manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies. *Lowa Ltd.* v. *United States*, 5 CIT 81 (1983). *United States Cane Sugar Refiners' Association* v.

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[6] Section 1514(a)(4) of Title 19 provides that a protest may be filed with respect to, "The exclusion of merchandise from entry or delivery under any provision of the customs laws."

[7] Section 1581(a) of Title 28 provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

Block, 69 CCPA 172, 683 F.2d 399 1982. There has been no indication in this case that section 1581(a) is inadequate or special circumstances demand assumption of jurisdiction under section 1581(i).

III

28 U.S.C. § 1585

Plaintiff lastly asserts jurisdiction under section 1585 which reads as follows:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

This assertion of jurisdiction by plaintiff is simply without merit. Section 1585 does not grant jurisdiction to the Court of International Trade, but rather confers the ability to grant injunctive relief to the court. *Kidco, Inc.*, v. *United States*, 4 CIT 103 (1982).

Section 1585 fulfills the intent of Congress to give the Court of International Trade the same equitable powers as a Federal district court. The legislative history of section 1585 reveals the following:

> Proposed section 1585 provides that the Court of International Trade shall possess all the powers in law and equity of, or conferred by statute upon a district court. In the past, there has been some doubt as to whether or not the Customs Court possessed this full judicial authority. It is the Committee's intent to make clear that the Customs Courts successor, the United States Court of International Trade, does possess the same plenary powers as a Federal district court.

H.R. Rep. No. 1235, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3762.

Therefore, since section 1585 is not a jurisdictional grant but rather a grant of equitable powers, plaintiff's assertion of jurisdiction under section 1585 is inappropriate.

CONCLUSION

For the above-mentioned reasons, this court is without subject matter jurisdiction in this matter. Given this determination, the federal defendants' motion to dismiss must be, and hereby is, GRANTED.

It is so ordered.

568 F. Supp. 760

GENE MILLER, PLAINTIFF v. RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 81-2-00121

Before RE, *Chief Judge.*

On Motion for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed.]

(Dated July 27, 1983)

Gene Miller, pro se.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

RE, *Chief Judge.* Plaintiff challenges the Secretary of Labor's determination denying certification of eligibility for trade adjustment assistance benefits to plaintiff and other former employees of an automobile dealership, Star Lincoln-Mercury Incorporated, Southfield, Michigan. The Secretary determined that the employees at Star Lincoln-Mercury failed to satisfy the third eligiblity criterion of section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976). Specifically, the Secretary found that plaintiff and his fellow employees were service workers employed by a firm that did not "produce" an article adversely affected by increased imports.

Section 222 provides, in pertinent part:

> The Secretary of Labor shall certify a group of workers as eligible to apply for adjustment assistance * * * if he determines—
>
> (1) That a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) That sales or production, or both, of such firm or subdivision have decreased obsolutely, and
>
> (3) That increases of imports of articles like or directly competitive with *articles produced* by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. [Emphasis added.]

* * * * * * *

On July 15, July 25 and September 2, 1980, separate groups of employees from Star Lincoln-Mercury filed petitions with the Department of Labor's Office of Trade Adjustment Assistance (OTAA) seeking certification of eligibility for worker adjustment assistance benefits. OTAA returned each petition stating that the employees performed services and, therefore, were ineligible for benefits under the Trade Act of 1974. Thereafter, the employees sought administrative reconsideration alleging that Star Lincoln-Mercury was owned and controlled by Ford Motor Company.

Based on the allegation, OTAA accepted the petitions, TA-W-11,067, and commenced an investigation. OTAA published a notice to that effect in accordance with section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a) (1976) and 29 CFR § 90.12 (1980). 45 Fed. Reg. 65704, 65705 (1980). The investigation disclosed the Star Lincoln-Mercury (the firm) was an independently owned and operated franchised automobile dealership. The firm conducted its business with a single supplier, Ford Motor Company, under the terms of a sales and service agreement. Neither Ford nor Star Lincoln-Mercury had a controlling interest in the other. Mr. Stanley Wilk, the firm's president, described the nature of the work performed by the employeees as being the sale and servicing of Lincoln-Mercury cars and trucks.

Based on its investigation, OTAA found that the firm was engaged exclusively in providing a service, and that it performed no production operations. The Secretary thus determined that, under his interpretation of section 222 of the Act, the firm's employees were ineligible for worker adjustment assistance benefits. 45 Fed. Reg. 79950, 79951 (1980).

Subsequently, on January 20, 1981, plaintiff commenced this action seeking judicial review of the Secretary's final determination pursuant to section 284(a) of the Trade Act of 1974, 19 U.S.C. § 2395(a) (Supp. IV 1980). Plaintiff proffers two reasons for reversal of the Secretary's negative determination. He first maintains that the Secretary wrongly interpreted the term "produced" in section 222(3) to apply only to workers who manufacture an import-impacted article. Plaintiff's second contention is that, as a practical matter, the Secretary's statutory interpretation has resulted in dissimilar treatment of similarly situated workers. Specifically, plaintiff asserts that the employees of Star Lincoln-Mercury were denied certification, while those at another new car agency, Patmon Oldsmobile, received certification.

Upon reviewing the administrative record herein, the court finds the Secretary's denial of certification supported by substantial evidence and in accordance with law.

The two issues raised by plaintiff were examined and discussed in this court's opinion in *Woodrum* v. *Donovan,* 5 CIT 191 (1983). There, the court affirmed the Secretary's determination that employees of independently owned automobile dealerships were ineligible for trade adjustment assistance benefits inasmuch as they were service workers who did not produce an import-impacted article.

On the question of the breadth of the term "produced," *Woodrum* held that "production under section 222(3) requires the manufacture or creation of something tangible." 5 CIT at 198. Ultimately, the test for workers seeking certification in whether they transformed articles on which they devoted their labors into something new and different. Ibid.; *Pemberton* v. *Marshall,* 639 F. 2d 798 (D.C. Cir. 1981).

As in *Woodrum* and *Pemberton,* plaintiff performed work on tangible articles, namely Lincoln-Mercury cars and trucks. Their work, however, consisted solely of selling and servicing completed articles. Plaintiff has failed to sustain his contention that the firm "produced" an import-impacted article. The record is devoid of any evidence showing that plaintiff or any other employee of Star Lincoln-Mercury transformed cars and trucks into new end products

Plaintiff also asserts he is entitled to relief based on the Secretary's determination certifying the employees of Patmon Oldsmobile Inc., TA-W-7269. 45 Fed. Reg. 51963, 51966 (1980). Plaintiff maintains that the Secretary's interpretation of section 222 has resulted in the creation of two classes of new car agency employees, *i.e.,* those who work for an independently owned and operated dealership, such as Star Lincoln-Mercury, and those who work for a dealership, such as Patmon, owned or substantially controlled by an automobile manufacturer.

This question was also examined in *Woodrum.* Based on similar facts, this court held that a differentiation in treatment, assuming all other requirements of section 222 were met, served a reasonable Government interest and was therefore permissible. This dissimilar treatment does not "result from an arbitrary, capricious or improper distinction," but rather "from a proper construction of the pertinent statute * * *." 5 CIT at 200. In sum, the distinction results from section 222 itself, and not from the Secretary's interpretation or application of that section.

There is no doubt that this action, in all relevant respects, is identical to *Woodrum. Thus, under stare decisis, Woodrum* is controlling. Accordingly, the court concludes that the Secretary of Labor's denial of certification is supported by substantial evidence and in accordance with law. The Secretary's determination is therefor affirmed.

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND COMPANHIA SIDERURGICA PAULISTA (COSIPA) AND USINA SIDERURGICAS DE MINAS GERAIS (USIMINAS), ET AL., DEFENDANTS-INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Memorandum Opinion and Order

[Motion for remand denied.]

(Decided July 28, 1983)

Law Department of United States Steel Corporation (D. G. King, J. J. Mangan, C. D. Mallick, L. Ranney and *P. J. Koenig* of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (Joseph R. Sahid and *Steven Schulman* of counsel) for plaintiffs, Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch *(Francis J. Sailer,* attorney, Commercial Litigation Branch) for the federal defendants.

Wald, Harkrader & Ross William H. Barringer, Christopher A. Dunn and *Arthur J. Lafave III* of counsel) for defendants-intervenors COSIPA and USIMINAS.

WATSON, *Judge:* In this judicial review the government has moved for a remand for forty-five days to allow the International Trade Administration of the Department of Commerce (ITA) to state and explain its determination as to the creditworthiness of the South African Iron and Steel Industrial Corporation (ISCOR), and two Brazilian steel producers, Companhia Siderurgica Paulista (COSIPA) and Usinas Siderurgicas de Minas Gerais S.A. (USIMINAS).

The issue of creditworthiness is one of the major issues in this judicial review, in which the Court has, for reasons of efficiency, provided for the briefing of various issues in stages. The creditworthiness issue relates to the determinations made that certrain loans to ISCOR, COSIPA and USIMINAS did not provide subsidies.[1] Although the ITA developed a methodology for determining creditworthines in Appendix 2 to its determination on steel from Belgium (47 Fed. Reg. 39, 316-39, 318 (1982)) and incorporated that appendix into its determinations regarding ISCOR, COSIPA and USIMINAS, it did not say anything about whether these companies were creditworthy. The detemination that certain loans were not subsidies was generally based on a finding that the interest rates were not preferential.

The request for remand comes after two extensions of time to file its brief on creditworthiness and after briefs on that subject have been filed by plaintiffs as well as by two *amici curiae*, namely, the Federal Trade Commission, and a group of European steel producers.[2]

It is first apparent that we do not have a completely unintelligible or unexplained administrative determination that these loans were not subsidies. If there is a flaw here, it may be in the failure to state and explain a subsidiary justification for the meaningfulness of the finding that the interest rates were not preferential. In this line of analysis the preliminary justification for engaging in interest rate comparisons would be that the companies were creditworthy to begin with. Otherwise comparisons using the interest rates they pay might be pointless.

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[1] The determinations were made in countervailing duty investigations of carbon steel plate from Brazil and certain steel products from South Africa. With respect to Brazil, notice of the suspension of the investigation was published at 47 Fed Reg. 39,394 (Sept. 7, 1982) and the final determination was published at 48 Fed Reg. 2,568 (Jan. 20, 1983). With respect to South Africa the final determination was published at 47 Fed. Reg. 39,379 (Sept. 7, 1982).

[2] Sacilor; Forges De Clabecq, S.A.; British Steel Corp.; Hoogovens Groep BV; and Usinor.

This possible line of reasoning in the judicial review might require a remand. But, the Court sees no particular advantage to making the remand now and it sees a number of disadvantages. First, other results are possible based on arguments being made which might either not require a remand or would require a different sort of remand. Second, the very fact that the remand is at best offered to clear up only one possible future development and requires the Court to engage in an analysis of possible alternative future developments indicates that it is not essential to the conduct of meaningful judicial review. Third, the Court does not want to encourage the disruption of the review at this late date for reasons which might have been perceived and expressed earlier. Fourth, the advantage of such a remand to the overall efficient disposition of this action is not clear.

For these reasons the government's motion for remand is DENIED.

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569 F. Supp. 874

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND HIGHVELD STEEL AND VANADIUM CORPORATION, LTD., ET AL., DEFENDANTS-INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Memorandum Opinion and Order

[Motions for clarification and modification granted.]

(Decided July 28, 1983)

Busby, Rehm and Leonard, P.C. (David Busby, John B. Rehm and *Larry E. Klayman* of counsel) for defendant-intervenors Highveld Steel and Vanadium Corporation Limited.

J. Paul McGrath, Assistant Attorney General *(David M. Cohen,* Director, Commerical Litigation Branch) for the federal defendants.

Law Department of United States Steel Corporation (D.B. King of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (Joseph R. Sahid of counsel) for plaintiffs Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

WATSON, *Judge:* In this opinion the Court clarifies its decision in *United States Steel Corp.* v. *United States,* 5 CIT 245 (1983), to indicate that it did not vacate the final determination and the countervailing duty order. It modifies the relief granted to remove the order that the International Trade Administration of the Department of Commerce (ITA) require the deposit of estimated duties and to remove the order that the ITA maintain the suspension of liquidation of entries of steel exported on or after April 1, 1982.

Following the decision in Slip Op. 83-53, the defendant-invertenor Highveld Steel and Vanadium Corp. Ltd. (Highveld) filed motions for clarification, amendment of the Court's order, certification for appeal of the part of the Court's order which required the deposit of estimated duties, stay of the order pending appeal, and reconsideration and modification of the decision. The federal defendants moved for rehearing, vacatur and modification. Plaintiffs filed responses and exceptions to the foregoing.

These motions required the Court to examine closely the decision's attempt to affect entries of products which are subject to the administrative determination under review.

For reasons of efficient management of this litigation the numerous issues involved are being briefed in stages. In this phase of the action the determination under review was the ITA final determination regarding an alleged railroad rate subsidy granted by South Africa to exported steel.

In essence, the ITA found that the subsidy had been in effect for a while and then had ended during the investigation. It called its determination affirmative, and found varying ad valorem rates of subsidy for products exported before the subsidy had ended and a zero ad valorem rate for products exported thereafter. The ITA also ordered that the suspension of liquidation ordered in its preliminary determination (which had been palpably affirmative) remain in effect until further notice. The Government represented that this held open the possibility of a revision in the zero subsidy rate after the first administrative review of the final determination (to be made under section 751(a) of the Tariff Act of 1930 (19 U.S.C. § 1675(a)).

The Court held that the subsidy had not been eliminated and that, if it had been eliminated, the ITA should have followed the procedures of section 704 (19 U.S.C. § 1671c) designed to suspend investigations while providing certain safeguards to petitioners.

In the Court's opinion, the final determination was invalid from all points of view, procedurally and substantively. If it was right in finding that the subsidy was ended, the procedures of section 704 (19 U.S.C. § 1671c) for possible suspension of the investigation should have been followed. Even assuming that reaching a final determination was procedurally proper, the determination had to be negative if the subsidy had ended. In both of those eventualities, the continuation of suspension of liquidation of entries of the product involved was unjustified. The Court's opinion was, that aside from being procedurally defective and improperly called an affirmative subsidy determination, the final determination was also not in accordance with the law because the subsidy had not ended.

From the Court's point of view, the last valid administrative determination was the preliminary determination which set in place a proper suspension of liquidation. In the end the ITA's makeshift suspension of liquidation turned out to be the right act done at the wrong time for the wrong reasons and on the wrong terms.

The Court ordered a renewed investigation into the existence of the rail subsidy. In addition, the Court carried its dissatisfaction with the ITA determination too far. The Court tried to impose its own terms on the ITA's suspension of liquidation by ordering the maintenance of the suspension during the remanded investigation together with the deposit of estimated duties of the amount previously set in the preliminary determination.

As will shortly be explained, by doing the former (ordering the maintenance of the suspension), the Court was enjoining the ITA from liquidating, or at least limiting the ITA's right to end its suspension of liquidation so long as the remanded investigation was underway. By doing the latter (requiring the deposit of estimated duties) the Court was interfering with the proper operation of 19 U.S.C. § 1516a(c)(1).[1] That subsection provides that entries made prior to publication of notice of a court decision shall be liquidated in accordance with the contested administrative decision.

Unless the liquidation of those entries is enjoined under 19 U.S.C. § 1516a(c)(2)[2] those prior entries will not be affected by court decisions.

Moreover, because this decision did not dispose of the entire action and was not intended to be final for appeal purposes within the meaning of Rule 54(b), even publication of notice of its result could not affect entries until after the final judgment in the entire action on all the numerous issues involved.

The present practical effect of this decision is to remand the matter to the ITA for further investigation. As a complete and separate resolution of one of the distinct issues in this case the decision is sufficiently final to serve as the basis for a remand even though it cannot affect the ongoing treatment of entries. In that remand, the timing for the conduct and conclusion of the renewed investigation has been left open to allow the ITA to coordinate the investigation with such future opinions or remands in this action as may be relevant.

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[1] 19 U.S.C. § 1516a.

* * * * * * *

(c) *Liquidation of entries.*

(1) *Liquidation in accordance with determination.* Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Customs and Patent Appeals, not in harmony with that determination. Such notice of decision shall be published within ten days from the date of the issuance of the court decision.

[2] 19 U.S.C. § 1516a(c).

* * * * * * *

(2) *Injunctive relief.* In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

It was beyond the power of the Court to affect the administrative processing of these entries. A justification cannot be based on the fact that the Court's interference in such temporary measures as depositing estimated duties or posting bonds does not have a final effect on the actual liquidation of the entries. To be meaningful, the provision of 19 U.S.C. § 1516a(c)(1) has to be read as requiring that all the administrative acts preparatory to liquidation have to be done in accordance with the challenged administrative determination for entries made while the action is pending.

This result is required even though the Court viewed the final determination as a negative determination in disguise and as procedurally invalid because it was reached in disregard of the suspension procedures of section 704 of the Tariff Act of 1930 (19 U.S.C. § 1671c).

The suspension of liquidation by the ITA has no bearing on the relief which the Court can provide. It does not make the suspended entries any more susceptible to the Court's decision than if they were being liquidated routinely. The only event which can subject entries to the Court decision is an injunction under 19 U.S.C. § 1516a(c)(2).

The administrative suspension, whether valid or not in the Court's view, is presently a facet of the ITA's treatment of these entries which can continue unaffected by the Court's decision because this particular decision was not a final judgment and also because by the operation of 19 U.S.C. § 1516a(c)(1) even a completely final judgment would not reach prior entries whose liquidation had not been enjoined.

For this reason, in retrospect it is possible to see that the Court's requirement that the suspension be maintained during the remanded investigation represented a form of injunctive relief granted without the necessary application or foundation.

The Court briefly notes that it has not entertained Highveld's motion for reconsideration and modification to the extent that it went to the issues of the elimination of the subsidy and the use of section 704 because those were issues on which it failed to present its views when those matters were originally under consideration by the Court. The issue of the nature of the relief did not fully arise until the Court's decision; so Highveld's participation on that point is entirely proper.

In sum, the fact that this was not a final judgment for purposes of appeal or that the liquidation of the entries it sought to affect had not been enjoined, allows entries to be handled administratively unaffected by the Court's opinion. This is the result of the operation of 19 U.S.C. § 1516a(c)(1). The entire edifice of the final determination, the resulting countervailing duty order and the suspension of liquidation remains in place while the renewed investigation is made. In all other respects, the decision remains unchanged.

To the extent indicated herein the motions for clarification and modification are Granted. All other motions filed herein are Denied.

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569 F. Supp. 65

The Timken Company, plaintiff v. United States, et al., defendants, NTN Bearing Corporation of America, intervenor

Court No. 82–6–00890

Before Maletz, *Senior Judge.*

Order Determining Scope of Temporary Restraining Order

(Dated August 1, 1983)

Eugene L. Stewart, Terence P. Stewart and *Robert E. Ruggeri* for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Velta A. Melnbrencis* on the briefs), for the defendants.

Barnes, Richardson & Colburn (James H. Lundquist, Robert E. Burke and *Edmund Maciorowski* on the briefs) for intervenor NTN Bearing Corporation of America.

Maletz, *Senior Judge:* Intervenor has filed a motion for a determination of the scope of a temporary restraining order (TRO) issued by the court on July 7, 1983 which enjoined the liquidation of all entries of specifically described tapered roller bearings and components from Japan since April 1, 1978. It appears that 129 refund checks covering entries which are the subject of the TRO, together with courtesy notices of liquidation, were mailed to intervenor on or before the date of issuance of the TRO. Even though liquidation of these entries had not in fact taken place, having been scheduled for July 8, 1983, the refund checks were nevertheless sent to intervenor in advance so that receipt of the refund monies would nearly conincide with the actual date of liquidation of the entries.

19 C.F.R. § 159.9(c) specifies that the date on which "Liquidated" is stamped on the entry papers represents the date of liquidation. This had not occurred either prior to or after issuance of the TRO. Contrary to intervenor's assertion, while receipt of courtesy notices of liquidation may give an impression of a fait accompli, such notices do not establish the fact or date of liquidation. *United States v. Reliable Chemical Co.,* 66 CCPA 123, C.A.D. 1232, 605 F. 2d 1179 (1978). Thus, the entries in question were not liquidated on the date the TRO was issued, notwithstanding intervenor's receipt of the refund checks and courtesy notice. Accordingly, it is hereby

Ordered that intervenor return to the Customs Service all checks representing duty refunds on merchandise entered since April 1, 1978.[*]

The Timken Company, plaintiff *v.* United States, et al., defendants, NTN Bearing Corporation of America, intervenor

Court No. 82-6-00890

Before **Maletz**, *Senior Judge.*

Opinion and Order

[Dated August 1, 1983]

Eugene L. Stewart, Terence P. Stewart and *Robert E. Ruggeri* for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs), for the defendants.

Barnes, Richardson & Colburn (*James H. Lundquist, Robert E. Burke* and *Donald J. Unger* on the briefs) for intervenor NTN Bearing Corporation of America.

Maletz, *Senior Judge:* Plaintiff The Timken Company (Timken) seeks through a motion for rehearing the issuance of a preliminary injunction enjoining the liquidation of entries of tapered roller bearings pending this court's review of the administrative record.[1] A nearly identical request was denied on December 22, 1982 in *Timken Co.* v. *United States,* 4 CIT 263, 553 F. Supp. 1060 (1982). During the intervening seven months, however, the Court of Appeals for the Federal Circuit (CAFC) issued its opinion in *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, No. 83-590 (June 27, 1983). That decision has a direct bearing on this court's earlier determination that Timken had failed to make the requisite showing of irreparable harm. *See Zenith,* Slip Op. at 7 ("the consequences of liquidaton . . . constitute irreparable injury"). With this patina on the concept of irreparable harm, *see S. J. Stile Assoc., Ltd.,* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981), it is now clear that Timken will suffer such harm or injury absent the issuance of a preliminary injunction.

For the reasons that follow, the court concludes that Timken has now met the four *Stile* criteria, *id.* at 525. Accordingly, its request for a preliminary injunction is hereby granted.

Before turning to the merits, the court first addresses several procedural issues which, intervenor submits, foreclose consideration of Timken's motion.

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[*] The Court has been informed that 14 refunds checks are for pre-April 1978 entries. Inasmuch as the TRO does not include that time period, but rather expressly covers only post-April 1978 entries, intervenor is not obligated under the terms of this order or the TRO to return those checks to Customs.

[1] On June 25, 1982 Timken filed the present action challenging an administrative review conducted pursuant to section 751 of the Trade Agreements Act of 1979, 19 U.S.C. § 1675 (Supp. IV 1980) by the International Trade Administration of the Department of Commerce (ITA). As a result of that review an antidumping duty order, issued on August 18, 1976, was revoked in part. *See* 47 Fed. Reg. 25757 (1982).

I

On July 1, 1983 Timken filed a motion for a rehearing pursuant to rule 59 of the rules of this court,[2] and a motion to alter or amend the judgment. On July 8, 1983 Timken filed an application for a preliminary injunction as an alternative to the July 1 motions. The court considers Timken's motion to be one for rehearing. *See* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2804 at 35 (1973) ("The concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury"). Intervenor NTN Bearing Corp. of America (NBCA) argues that either a rule 59 motion or a motion for a preliminary injunction is barred for at least two reasons. First, on February 10, 1983 a motion for a rehearing of the December 22, 1982 denial of Timken's first application for a preliminary injunction was denied. Res judicata, it argues, thus precludes relitigation of the issues finally determined in the December 22 and February 10 orders. If Timken was dissatisfied with those orders, NBCA contends, it should have taken an appeal. Second, any rule 59 motion at this late date is out of time, given the 30-day filing deadline of rule 59(b).

While NBCA's position would not be without force if the present rule 59 motion related to a *final* judgment or order, the short answer is that Timken's motion is directed to a rehearing of an order interlocutory in nature. Although it is true that an interlocutory order may be considered a final order in certain limited contexts, such as appeals under 28 U.S.C. § 1292(a), in the context of a rule 59 motion the court is of the view that in an action *sub judice*, where final judgment has not been entered, an order granting or denying a motion for a preliminary injunction is interlocutory. In other words, finality is not a monolithic, immutable concept, and hence an order may be final for some purposes, but interlocutory for others. *See* 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.409[1] (2d ed. 1982); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4432 at 301 n.6 (1981). And the court retains the plenary power to modify or alter its prior non-final rulings, particulary where the equitable powers of the court are invoked. *See United States* v. *Chicago,* 395 F. Supp. 329, 339–40 (N.D. Ill.), *aff'd,* 525 F.2d 695 (7th Cir. 1975); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 65.07 (2d ed. 1982). As noted in *Walsh* v. *ILA, Local 799,* 630 F.2d 864, 875 (1st Cir. 1980), "The doctrine of res judicata is an equitable one, and a court is not bound to give res judicata effect to a previous judgment if an inequitable situation would thereby result." [3] In light of *Zenith* the interests of equity here dictate that Timken not be precluded from pressing its motion.

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[2] Rule 509 provides in part:

Rule 59. *New Trials—Rehearings—Amendment of Judgments.*

(a) *Grounds.* A new trial or rehearing may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States * * *.

(b) *Time for Motion.* A motion for a new trial or rehearing shall be served and filed not later than 30 days after the entry of the judgment or order.

The court further finds nothing preclusive in Timken's decision not to take an appeal from this court's earlier orders. The appeal in *Zenith* was pending at the time, so that an appeal by Timken would clearly have been duplicative. Conservation of judicial resources is not something to be faulted.

Having concluded that Timken's motion involves a rehearing on an interlocutory rather than a final order, NBCA's second contention that the motion is out of time under rule 59(b) is easily disposed of. For the time constraints of rule 59(b) apply only to final judgments or orders. "A motion addressed to the trial court for reconsideration of an interlocutory order is proper at any time prior to the final determination of the merits." *Graci* v. *United States,* 301 F. Supp. 947, 950 (E.D. La. 1969), *aff'd,* 456 F.2d 20 (5th Cir. 1971) (construing F. R. Civ. P.59(b)). *See also* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2812 at 87 (1973) ("the time limits of Rule 59 do not apply to a motion seeking a new trial in connection with an interlocutory judgment").

In sum, Timken's motion for rehearing is timely filed and not barred by either rule 59 or res judicata. The court turns to a consideration of the merits.

II

Although they have been stated so often in the course of this and other litigation as to resemble a litany, the four criteria for the issuance of a preliminary injunction still bear repeating. In order to prevail on a motion for a preliminary injunction the petitioner must show (1) that there is a substantial likelihood of success on the merits; (2) that without the relief requested the petitioner will be irreparably injured; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested. *Virginia Petroleum Jobbers Ass'n* v. *FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958). *See also S. J. Stile Assoc., Ltd.* v. *Snyder; Washington Metropolitan Transit Comm'n* v. *Holiday Tours, Inc.,* 559 F.2d 841 (D.C. Cir. 1977). Inasmuch as the CAFC's recent opinion in *Zenith* furnished the impetus for Timken's present motions, the court will first consider the question of irreparable injury in light of that decision.

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[3] NBCA's reliance on *Walsh* as authority for the position that orders involving the grant or denial of preliminary injunctions are final is misplaced. There, the applicant was engaged in barely disguised forum shopping, having made motions for a preliminary injunction in three identical actions which were filed in two different district courts in two different circuits. In order to put an end to this repetitive and vexatious litigation, as well as to avoid the real possibility of inconsistent decisions, the First Circuit held that res judicata barred subsequent applications for a preliminary injunction. 630 F.2d at 869.

A

Irreparable Injury

The burden that Timken must meet to establish irreparable injury was elaborated in the *Stile* decision:

> Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined * * * A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, acutal threat must be shown.

646 F.2d at 525 (citations omitted). The gloss which the CAFC's *Zenith* option adds to *Stile* is that while the injury must be serious and genuine, it need not be commercial or economic in nature. Slip Op. at 6–7. In that case Zenith, like Timken, sought to enjoin the liquidation of entries pending its judicial challenge of a section 751 review determination by the ITA.[4] In concluding that liquidation of those entries would constitute irreparable injury the CAFC provided the following detailed rationale:

> [L]iquidation would indeed eliminate the only remedy available to Zenith for an incorrect review determination by depriving the trial court of the ability to assess dumping duties on Zenith's competitors in accordance with a correct margin on entries in the '79–'80 review period. The result of liquidating the '79–'80 entries would not be economic only. In this case, Zenith's statutory right to obtain judicial review of the determination would be without meaning for the only entries permanently affected by that determination. In the context of Congressional intent in passing the Trade Agreements Act of 1979 and the existing finding of injury to the industry underlying T.D. 71-76, we conclude that the consequences of liquidation do constitute irreparable injury.
>
> Without a preliminary injunction, all of the entries occurring during the review period will be liquidated immediately, with dumping duties assessed in accordance with the margin set by the review determination. This result is required, in the absence of a preliminary injunction, by two sections of the Trade Agreements Act of 1979 [19 U.S.C. §§ 1516a(e) and (c) (1) (Supp. IV 1980)].
>
> * * * * * *
>
> The statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on [those liquidated entries] * * *

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[4] *See* 19 U.S.C. § 1675 (Supp. IV 1980).

* * * * * * *

> * * * Accordingly, the inability of reviewing courts to meaningfully correct the review determination is irreparable injury that must be considered by the trial court along with the other pertinent factors recited in *Stile* to determine whether or not an injunction should be issued.

Id. slip op. at 7–9, 12. In the present case there remain unliquidated approximately 121 entries for the period April 1978 to the date of partial revocation of the antidumping duty order (June 15, 1982), as well as 14 entries made after June 15, 1982. (This total does not include merchandise entered after January 19, 1983.) Thus, unless liquidation is enjoined Timken will forever lose its statutory right to challenge the alleged failure of the ITA to assess antidumping duties against those entires.[5]

B

Accordingly, on the basis of *Zenith*, Timken has met its burden of showing irreparable injury.

Likelihood of Success on the Merits

Once the initial requisite showing of irreparable harm has been made, it is incumbent upon the applicant for a preliminary injunction to establish that there is a likelihood that it will prevail on the merits of its case.[6] It must be kept in mind, however, that the degree of likelihood of success is not determinative. 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2948 at 453 (1973). *See* Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction,* 71 Colum. L. Rev. 165 (1971). Rather, it must be considered and balanced with the comparative injuries of the parties, an exercise involving a flexible interplay between the two criteria. *Packard Instrument Co.* v. *ANS, Inc.*, 416 F.2d 943, 945 (2d Cir. 1969). Accordingly, although a showing that the moving party will be more severely prejudiced by a denial of the injunction than the opposing party would be by its grant does not remove the need to show some probability of prevailing on the merits, it does lower the standard that must be met. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). In such a circumstance it will ordinarily be sufficient that the movant has raised questions which are "serious, substantial, difficult and doubtful." *County of Alameda* v. *Weinberger*, 520 F.2d 344, 349 n.12 (9th Cir. 1975).

In the present action Timken has raised at least three issues which amount to a substantial case on the merits. First, 19 C.F.R.

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[5] The obverse of this is, of course, that the court would lose jurisdiction over the subject matter as a result of mootness. *Cf.* The All Writs Act, 28 U.S.C § 1651(a) (1979).

[6] The Second Circuit frames the issue in an alternative way—whether there are "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor." *Coca-Cola Co.* v. *Tropicana Products, Inc.*, 690 F.2d 312, 315 (1982).

§ 353.54(b) provides that an application for the revocation of an antidumping duty order "will be considered only if there have been no sales at less than fair value for at least a two-year period following the date of publication" of the antidumping duty order. Here, the revocation of the antidumping duty order was premised on a finding of no less than fair value sales over a 19-month period, contrary to the clear expression in the ITA's own regulations to employ a 24-month review period.

Second, there is a substantial question raised regarding advertising allowances and adjustments since most of the foreign manufacturer's advertising was purportedly image advertising and unrelated to the imported merchandise.

Third, there are a host of legal issues raised by Timken which, although decided adversely to its position in *Brother Industries, Ltd.* v. *United States,* 3 CIT 125, 540 F. Supp. 1341 (1982), *appeal docketed sub nom Smith-Corona Group* v. *United States,* No. 82–24 (CAFC 1982),[7] nevertheless raise questions which are serious, substantial and difficult. These issues include the propriety of (a) the exporter's sales price offset provided under 19 C.F.R. § 353.15(c), (b) the allowance for a difference in circumstances of sale of merchandise in the absence of a causal link establishing that there is some price effect, and (c) the deduction for inland freight from home market value.

Balancing these issues with the comparative harm to the parties should an injunction not issue—a factor which the court addresses next—it is clear that, while Timken's case is not free from significant difficulties, it has established a substantial case on the merits.

C

The Balance of Hardships

On the question of whether the issuance of a preliminary injunction will substantially harm other interested parties, the court is of the view that NBCA and the government will suffer little, if any, harm. The government is acting as a mere stakeholder and would be at most inconvenienced by the suspension of liquidation. NBCA, on the other hand, does stand to lose the use of monies deposited with the Customs Service which, but for the issuance of an injunction suspending liquidation, would have been returned to it. The court believes, however, that the posting of security will ameliorate, if not eliminate, this hardship. If security can compensate an adverse party for any harm the injunction is likely to inflict, the balance should be struck in favor of the movant. 11 C. Wright & A. Miller, *supra,* § 2948 at 44. *See* discussion on security, *infra,* at

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[7] A stay pending appeal was entered by the court reviving the injunction suspending liquidation of all entries. *Brother Industries, Ltd.* v. *United States,* 3 CIT 242, (1982). The criteria employed in issuing a stay pending appeal are substantially identical to those used in issuing a preliminary injunction. *See, e.g., EEOC* v. *County of Los Angeles,* 531 F. Supp. 122 (C.D. Cal. 1982), *aff'd,* 706 F.2d 1039 (9th Cir. 1983).

Part III. Moreover, balanced against the hardship to Timken—complete loss of its right to judicial review if the liquidation of these entries is not enjoined—the balance of hardships tips decidedly in Timken's favor.

D

The Public Interest

The final major factor bearing on the court's discretion to issue or deny a preliminary injunction is the public interest. While "the public interest lies in the faithful excution by the Executive Branch of the laws enacted by Congress, *Zenith Radio Corp.* v. *United States,* 1 CIT 53, 58, 505 F. Supp. 216, 220 (1980), focusing on this factor is yet another way of inquiring "whether there are policy considerations that bear on whether the order should issue." 11 C. Wright & A. Miller, *supra,* § 2948 at 457. One clearly discernible policy consideration applicable here, and given great prominence in the CAFC's *Zenith* opinion, is a party's statutory right to a judicial hearing following an adverse agency determination. Short-circuiting that right by allowing the subject matter to escape the reach of a reviewing court cannot be in the public interest. There is, of course, a concomitant public interest in expeditious dispute resolution so that parties in the position of NBCA are not unduly burdened by protracted litigation. Nevertheless, as between these two considerations—the interest in avoiding delay in liquidation occasioned by the issuance of injunctions and the interest in preserving a party's right to judicial review—the former must be subordinated to the latter. "[T]he mooting of this controversy, which is what would result in the absence of an injunction, would constitute a disservice to the public interest." *Zenith Radio Corp.,* 1 CIT at 58, 505 F. Supp. at 220.

Having thus considered each of the four *Stile* criteria and having concluded that Timken has satisfied each, the court turns finally to the issue of security.

III

NBCA has filed a motion to establish security pursuant to rule 65(c) of the rules of this court. That rule provides in part:

> *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. * * *

Timken reads this provision as a flat prohibition against requiring security for any party who is not actually enjoined or restrained. Accordingly, Timken concludes, since it is the government and not NBCA who will be enjoined, NBCA cannot request the posting of a bond or other security.

The court finds Timken's rather narrow construction of rule 65(c) to be skewed. Rule 65(c), properly read, merely provides that as a condition precedent to the issuance of a restraining order or preliminary injunction security shall first be given to protect the enjoined party. That rule does not state that security may not be required to protect other party-litigants who may be harmed by the operation of an injunction which is subsequently found to have been wrongfully issued.[8] In the somewhat unique circumstances arising under United States trade law, the court is presented with a situation where NBCA, as intervenor, will be the only party harmed if it should develop that the injunction was improvidently issued; and yet the government, as stakeholder and liquidator, is the only party who can be enjoined.[9] The result argued for by Timken would be highly inequitable and cannot be countenanced by a court sitting in equity. In short, NBCA, as a party in interest, is entitled to security where, as here, it is plainly evident that it will have suffered a compensable loss—the use of the monies held by the government as duties—in the event the government is found to have been wrongfully enjoined.

Timken's two case authorities for its position that only the enjoined party may demand security are wholly unpersuasive. In *Puerto Rico* v. *Price Comm'n,* 342 F. Supp. 1308 (D.P.R. 1972), a codefendant's request for an increase in the amount of security bond was denied simply on the ground that "[t]he amount of security bond required . . . is a matter that falls within the ample range of discretion" of the court. *Id.* at 1309–10. Similarly unavailing is *Powelton Civic Home Owners Ass'n* v. *HUD,* 284 F. Supp. 809 (E.D. Pa. 1968). The pivotal language of that opinion explains why security was not required:

> We have been concerned only with the legality under federal law of the disbursement of federal funds by federal officers. As the plaintiffs explained in their brief and at oral argument, the Philadelphia Redevelopment Authority was named as a party defendant merely as a courtesy and in order to allow the Court to hear the local agency's point of view. They were not indispensable defendants; *nor have they been legally affected by our decision in this case.*

Id. at 814 (emphasis added). Unlike the situation in *Powelton,* here NBCA will be denied its legal right to a refund of duties deposited with the Customs Service by operation of the preliminary injunction. Whether such denial is wrongful *vel non* only future events will prove. The fact remains, however, that NBCA will be legally affected by the decision on the merits in this action. Accordingly, NBCA's motion to establish security is granted.

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[8] There can be no serious dispute but that NBCA is a party in interest. *See* 19 U.S.C. § 1516a(d) (Sup. IV 1980). *See also* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶24.16[4] at 24–178 (2d ed. 1982).

[9] The court notes in passing that in an order filed on this day determining the scope of this court's temporary restraining order of July 7, 1983, NBCA has been ordered to return refund checks to the Customs Service which were inadvertently issued to NBCA. In a very real sense, then, NBCA is a party enjoined.

Timken shall be required to post a bond or other good and sufficient security in the amount of $100,000.00. This figure reflects the amount of duty refunds presently due NBCA multiplied by (1) simple interest at an annual rate of 10% and (2) the estimated duration of these proceedings, that being the period from July 8, 1983 (the date on which NBCA would have received duty refunds but for the temporary restraining order) until final judgment is entered in this action.[10] Any amount of security based on duty deposits on future entries, or on criteria other than interest computed on refunds which are known to be due, would be highly speculative. Given this court's discretionary power under rule 65(c), coupled with the imprecise measure of some of the elements of damage, the court believes that security of $100,000.00 is adequate and reasonable. *See* 11 C. Wright & A. Miller, *supra,* § 2954 at 525–26.

IV

In view of the foregoing it is hereby ordered:

1. That plaintiff's motion for a rehearing on its application for a preliminary injunction and motion to alter or amend the judgment are granted;

2. That the order of December 22, 1982, 4 CIT 263, 553 F. Supp. 1060, denying plaintiff's motion for a preliminary injunction is vacated;

3. That the defendants be, and they hereby are, restrained from liquidating any and all unreliquidated entries of the merchandise covered by the determination contested in this action, i.e., Final Results of Administrative Review and Revocation in Part of Antidumping Finding, a notice of which was published on June 15, 1982 in 47 Fed. Reg. 25757–9;

4. That as a condition to the grant of preliminary injunctive relief a $100,000.00 bond or equivalent security be posted by plaintiff with the clerk of the court; and

5. That unless sooner modified or vacated for good cause shown this order shall expire upon the entry of final judgment on the merits in this action.

THE TIMKEN COMPANY, PLAINTIFF, *v.* UNITED STATES, ET AL., DEFENDANTS, NTN BEARING CORPORATION OF AMERICA, INTERVENOR

Court No. 82–6–00890

Before MALETZ, *Senior Judge.*

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[10] The amount of duty refunds is business confidential and is the subject of a judicial protective order entered this day. With that figure, the 10% interest rate and the amount of security, the parties will then, of course, be able to compute the court's estimate as to the duration of these proceedings.

(Dated August 1, 1983)

Order Granting in Camera Review and Protective Order

Eugene L. Stewart, Terence P. Stewart and *Robert E. Ruggeri* for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs), for the defendants.

Barnes, Richardson & Colburn (*James H. Lundquist, Robert E. Burke* and *Donald J. Unger* on the briefs) for intervenor NTN Bearing Corporation of America.

MALETZ, *Senior Judge:* Upon reading and filing intervenor's motion for a protective order covering certain business confidential information attached to intervenor's instant motion and to its motion to establish security pursuant to court rule 65(c) filed concurrently, plaintiff's opposition thereto (defendants having no opposition to the motion), and the court having examined *in camera* each of the confidential documents in question, it is hereby

ORDERED that access to such confidential information shall be made available only to defendants and to the law office of Eugene L. Stewart, counsel for plaintiff, under the terms of a protective order mutually agreeable to the parties. The only demonstrable need which plaintiff has for this information is to determine the propriety of the amount of security required of it by this court's concurrent order granting plaitiff's motion for rehearing. The assistance of plaintiff's in-house counsel is entirely unnecessary for completion of this task. *See Atlantic Sugar, Ltd.* v. *United States,* 85 Cust. Ct. 133, C.R.D. 80-18 (1980). *See also U.S. Steel Corp.* v. *United States,* 6 CIT 55 (1983).

V. G. NAHRGANG CO. F/A ANTHONY PAGLIALUNGO, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-4-00410

Before BERNARD NEWMAN, *Judge.*

Waterproofing Material

Importations of waterproofing material, invoiced as "Paralon NT4" and "Paralon 77"—used for roofing and other applications—consisting of a mastic composed of modified bitumen (a mixture of bitumen and various polypropylenes) applied to a nonwoven polyester fabric core, is not classifiable under the superior heading to item 771.42, TSUS, as "wholly or almost wholly of * * * plastics", as claimed by plaintiff. The plaintiff urges that the essential character of the merchandise (waterproofing) is imparted by the mastic and that the mastic is "plastic". HELD: Plaintiff failed to establish that the mastic constitutes "plastics" as defined in headnote 2, Schedule 4, Part 4A, TSUS, since there is no proof that the mastic is "formed by the condensation, polymerization or copolymerization of organic chemicals", or that the mastic was "derived from" polypropylene.

Plaintiff's further claim that the merchandise is classifiable under item 771.42 because it is in chief value of plastics is also without merit, inasmuch as the component material of chief value is not the criterion of whether the merchandise is "wholly or almost wholly of" plastics.

Since plaintiff failed to establish its claimed classification under item 771.42, TSUS, Customs' classification of the merchandise under item 355.25 is not precluded by the operation of headnote 1(vii) to part 4C of Schedule 3, TSUS.

[Judgment for defendant.]

(Decided August 8, 1983)

Sonnenberg & Anderson, Esqs. (Paul S. Anderson and *Steven Sonnenberg, Esqs.* on the brief and at the trial) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch *(Jerry P. Wiskin, Esq.,* on the brief and at the trial) for the defendant.

INTRODUCTION

BERNARD NEWMAN, *Judge:* Plaintiff contests the classification by Customs (at the port of Detroit, Michigan) of certain rolls of waterproofing material imported from Italy in December 1979, and described on the invoices covered by the entries as "Paralon NT4" and "Paralon 77". In liquidating the entries, the District Director classified the importations under item 355.25 of the Tariff Schedules of the United States ("TSUS"), and duty was assessed at the rate of 12 cents per pound plus 15 per centum ad valorem. Plaintiff advances the claim that the merchandise is properly dutiable at the rate of 6 per centum ad valorem under item 771.42, TSUS.[1]

Competing Statutory Provisions

Classified under:

SCHEDULE 3, PART 4, SUBPART C

Webs, wadding, batting, and nonwoven fabrics, including felts and bonded fabrics, and articles not specially provided for of any one or combination of these products, all the foregoing, of textile materials, whether or not coated or filled:

* * * * * * *

355.25	Of man-made fibers	12¢ per lb. + 15% *ad val.*

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[1] Plaintiff in its complaint has alternatively claimed that the merchandise is classifiable under item 521.11, TSUS, or under item 523.91, TSUS. However, since plaintiff has not pursued either of its alternative claims, at the trial or in its brief, they are deemed abandoned and are dismissed. *Cf. E. R. Squibb & Sons, Inc. v. United States,* 75 Cust. Ct. 198, C.R.D. 757, 432 F. Supp. 1354 (1975).

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Claimed under:

SCHEDULE 7, PART 12, SUBPART B

Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics:

* * * * * * *

Not of cellulosic plastics materials:
Film, strips, and sheets, all the foregoing which are flexible:

* * * * * * *

771.42 Other .... 6% *ad val.*

Issue Presented

Central to the resolution of this case is whether the imported merchandise is "wholly or almost wholly of * * * plastics," within the purview of the superior heading to item 771.42, as contended by plaintiff. For the reasons that follow, plaintiff's claim must be overruled.

The Record [2]

The subject merchandise—used for roofing and other waterproofing applications—consists of a mastic composed of modified bitumen (a mixture of bitumen and various polypropylenes) applied to a nonwoven polyester fabric core. The nonwoven polyester fabric core (sold under the trade name "Trevira") used in the Paralon NT4 weighs 150 grams per square meter while the fabric used in the Paralon 77 weighs 130 grams per square meter. Other than bitumen, polypropylenes and polyester fabric, there are small quantities of other component materials in the merchandise, but such other materials have no significance concerning the issues presented in this case.

Briefly, the imported goods are produced in the following manner: The mastic is obtained by mixing hot bitumen in a liquid state with the polypropylenes, which mixture is then processed into a membrane. After production of the mastic in the form of a membrane, the nonwoven polyester core is sunk into the mastic. The additional minor components in the products facilitate adhesion in their application and act as an antiadhesive to make the material easier to unroll.

The sole use of the Paralon products is for the waterproofing of roofs and other waterproofing applications. While bitumen alone has good waterproofing characteristics, polypropylene (a plastics material) is added to the bitumen as a modifying agent for the purpose of imparting flexibility to the mastic. The nonwoven polyester fabric core, although not waterproof in itself, contributes tensile strength essential to an effective and "workable" waterproofing membrane (Tr 102). Additionally, "[t]he polyester fabric is used to obtain a waterproofing sheet in a continuous form in the fabrication process" (Tr 103).

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[2] At the trial, plaintiff and defendant each presented the testimony of three witnesses. Additionally, sixteen exhibits and the official entry papers were received in evidence on behalf of plaintiff, while twelve exhibits were submitted on behalf of defendant.

OPINION

Initially, we consider plaintiff's burden of proof in this case. If the merchandise is properly classifiable under item 771.42, TSUS, as asserted by plaintiff, then the Government's classification under item 355.25 is precluded by virtue of headnote 1(vii), Schedule 3, Part 4, Subpart C. *Cf. United States* v. *Canadian Vinyl Industries, Inc.,* 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977); *United States* v. *Elbe Products Corp.,* 68 CCPA 72, C.A.D. 1267, 655 F.2d 1107 (1981). In support of its cause that the merchandise is properly dutiable under item 771.42, TSUS, plaintiff maintains that the imported Paralon is "wholly or almost wholly of * * * plastics". The terms "wholly of" and "almost wholly of" are defined in General Headnote 9(f) (ii) and (iii) as follows:

> (f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture *of* wood", "woven fabrics, *wholly of* cotton", etc.), have the following meanings:
>
> * * * * * * *
>
> (ii) "wholly of" means that the article is, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material;
>
> (iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present; * * *

As may be noted from the above, the TSUS term "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the presence of significant quantities of other materials. Respecting this criterion, Judge Landis observed in *United China & Glass Co.* v. *United States,* 61 Cust. Ct. 386, 389, C.D. 3637, 293 F. Supp. 734 (1968):

> The character of an article is that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is.

And in *Canadian Vinyl Industries, Inc.* v. *United States,* 76 Cust. Ct. 1, 2, C.D. 4626 (1976), *aff'd* 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977), Judge Watson commented:

> Discernment of the essential character of articles is not likely to develop into an exact science but, insofar as some consistency and predictability is possible, it is likely to be found in concentrating on whether the material in question supplies the distinctive feature of the article and not in examining all the characteristics of the article and, if some other material contributes important characteristics, declining to give one material the primacy which its role deserves. General headnote 9(f)(iii) [footnote omitted] acknowledges the possibility that significant quantities of some other materials may be present and implicitly recognizes that those other materials will impart something to the character of the article.
>
> Therefore, the existence of other materials which impart something to the article ought not to preclude an attempt to isolate the most outstanding and distinctive characteristic of the article and to detect the component material responsible for that "essential characteristic."

See also: Judge (now Chief Judge) Re's opinion in *Larry B. Watson Co. v. United States,* 64 Cust. Ct. 343, C.D. 4001 (1970).

Plaintiff argues that the essential character of the imported merchandise is its waterproofing capability, and that this character is imparted by the mastic portion of the merchandise. Further, plaintiff contends that the mastic portion is a "plastics" material as defined in Schedule 7, Part 12 headnotes:

> *Part 12 headnotes:*
>
> 1. For the purposes of the tariff schedules—
>
> * * * * * * *
>
> (b) the term *"plastics"* refers to—
>
> (i) synthetic plastics materials, as defined in parts 1C and 4A of schedule 4,
>
> SCHEDULE 4, PART 4, SUBPART A HEADNOTES, TSUS
>
> 2. The term *"synthetic plastics materials"*, in this subpart, embraces products formed by the condensation, polymerization, or copolymerization of organic chemicals and to which an antioxidant, color, dispersing agent, emulsifier, extender, filler, pesticide, plasticizer, or stabilizer may have been added. These products contain as an essential ingredient an organic substance of high molecular weight; are capable, at some stage during processing into finished articles, of being molded or shaped by flow; and are solid in the finished article. The term includes, but is not limited to, such products derived from esters of acrylic or methacrylic acid; * * * polyethylene, polypropylene, and other polyalkene resins; * * * These synthetic plastics materials may be in solid, semi-solid, or liquid condition such as flakes, powders, pellets, granules, solutions, emulsions, and other basic crude forms not further processed.

Defendant insists that plaintiff has failed to establish that the mastic portion of the merchandise is "plastics" as defined above, and that although polypropylene is plastic, the essential character of the merchandise is imparted by the bitumen and polyester core as well as polypropylene, since all three of these components are required for an effective waterproofing membrane.

While I agree with plaintiff that the essential character of the merchandise is its waterproofing capability,[3] plaintiff has failed to prove its claim that the mastic portion of the merchandise is a synthetic plastics material as defined in headnote 2 of Schedule 4, Part 4, Subpart A.

Plaintiff's argument, essentially, is, that the mastic portion is a "synthetic plastics material" because bitumen constitutes an organic material and polypropyl-ene is specifically mentioned in the headnote definition. Although the evidence shows that polypropylene was mixed with the bitumen as a modifier to impart flexibility to the mastic,[4] neither the bitumen in itself nor the mastic material as a whole was established to be a synthetic plastics material. To fall within the definition of "synthetic plastics materials" in headnote 2, part 4A, Schedule 4, a material must be "formed by the condensation, polymerization or copolymerization of organic chemicals". But there is not a scintilla of evidence in the record to show that either the bitumen (which is 70 percent by weight of the mastic) itself or the mastic as a whole was formed by any of the specified processes.

Moreover, while headnote 2, Schedule 4, Part 4A provides that the term "synthetic plastics materials" includes products "derived from" polypropylene, the mastic (which is 70 percent by weight bitumen) obviously was not derived from polypropylene.

Since the record does not establish that the mastic portion of the merchandise is a plastics material, plaintiff has failed to demonstrate that the merchandise is almost wholly of plastics within the purview of the superior heading to item 771.42, TSUS. I further conclude that since the mastic is not plastics, as defined in the TSUS, the merchandise obviously is not "wholly" of plastics by virtue of headnote 5 of the Schedule 3.[5]

Plaintiff's contention that the merchandise should be regarded as almost wholly of plastics, because it is allegedly in chief value of plastics, is untenable. Inasmuch as the essential character of the merchandise (viz., its waterproofing capability) is not imparted by a plastics material, the merchandise cannot be regarded as "almost wholly of" plastics, irrespective of the component material of chief value. Simply put, component material of chief value is not the criterion for determining whether an article is almost wholly of a named material under General Headnote 9(f)(iii). *C. Itoh & Co.* v. *United States,* 1 CIT 223, 228, 520 F. Supp. 273, 276 (1981), *aff'd,* 69 CCPA 147, 678 F.2d 218 (1982).

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[3] *Cf. A.N. Deringer, Inc.* v. *United States*, 66 Cust. Ct. 378, C.D. 4218 (1971).

[4] While polypropylene is concededly a plastics material, plaintiff does not contend that the essential character of the Paralon material (waterproofing) is imparted by the polypropylene modifier alone. *Cf. Marshall Co.* v. *United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971). On the contrary, plaintiff concedes (brief, 20) that any ancillary characteristics, such as flexibility or ease of application, "may go to the superiority of that particular product, but not to the one indispensable characteristic for which the subject merchandise is applied and utilized, waterproofing".

[5] Headnote 5 in Schedule 3 reads:

For the purposes of parts 5, 6, and 7 of this schedule and parts 1 (except subpart A), 4, and 12 of schedule 7, in determining the classification of any article which is wholly or in part of a fabric coated or filled, or laminated, with nontransparent rubber or plastics (which fabric is provided for in part 4C of this schedule), the fabric shall be regarded not as a textile material but as being wholly of rubber or plastics to the extent that (as used in the article) the nontransparent rubber or plastics forms either the outer surface of such article or the only exposed surface of such fabric.

In any event, plaintiff failed to prove the component material of chief value of the Paralon 77. It is well settled that the proper method for determining the component material of chief value is to ascertain the costs of the separate component materials at the time they have reached the state when nothing further need be done except combine them into the completed article. *United States* v. *Jovita Perez,* 44 CCPA 35, C.A.D. 633 (1957).

At the trial, plaintiff offered into evidence a memorandum covering the calculation of the values of various component materials used in Paralon NT4 and Paralon 77 prepared by plaintiff's witness Dr. Guido Satta, the Director of Production and Material for Imper S.p.A. of Torino, Italy, the manufacturer and exporter of the subject merchandise. Attached to Dr. Satta's memorandum are invoices taken from the manufacturer's business records and submitted to support the cost data used in the value calculations. I received the memorandum into evidence (as exhibit 15, with subexhibits A through F) subject to connection (Tr 69)), and defendant subsequently moved to strike that portion of exhibit 15 pertaining to Paralon 77 (Tr 84). I reserved decision on defendant's motion (Tr 88).

Defendant's motion to strike is granted, predicated on:

Dr. Satta testified that exhibit 9, consisting of a polyester fabric weighing 130 grams per square meter, was the only fabric utilized in Paralon 77 (Tr 35–37, 80). However, in exhibit 15, subexhibit C, Dr. Satta submitted an invoice for polyester fabric weighting only 110 grams per square meter, rather than the 130 grams per square meter fabric which Dr. Satta testified was used in the imported Paralon 77. Satta attempted to explain this discrepancy, on cross-examination, by stating that in the trade a tolerance of plus or minus 20 grams per square meter was permissible, and that "we tend to buy the lower limit of tolerance allowed" (Tr 81). Plainly, Dr. Satta's explanation is deficient.

While it may be true that the manufacturer had a permissible tolerance in the weight of the fabric core used in its product, the fact remains that only 130 grams per square meter fabric (as represented by exhibit 9) was utilized in the imported Paralon 77 material, according to Dr. Satta's own testimony (Tr 35–37, 80), and further, no proof was submitted as to the cost of such fabric. The circumstance that the manufacturer "tended" to buy the lowest weight fabric within the permissible tolerance (Tr 81) clearly does not prove the cost to the manufacturer of the actual fabric weight (130 grams per square meter) utilized in the subject importation. Since plaintiff has failed to connect the cost of the 110 grams per square meter fabric covered by exhibit 15C with the cost of the 130 grams per square meter fabric utilized in the imported Paralon 77, defendant's motion to strike is granted.

The short of the matter is that plaintiff failed to establish that the mastic is plastic. Hence, we need not reach the question of whether it is the mastic alone which imparts the essential character to the subject merchandise, as contended by plaintiff, or whether the essential character is imparted by both the mastic and polyester core, as argued by defendant.

In summary, inasmuch as plaintiff has failed to prove that the imported merchandise is "wholly or almost wholly" of plastics, its claim under item 771.42 TSUS, is overruled.

Accordingly, the action is dismissed.

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570 F. Supp. 41

R.E. Abbott, et al., plaintiffs v. Raymond J. Donovan, Secretary of Labor, United States Department of Labor, defendant

Court No. 81-1-00028

Before Re, *Chief Judge.*

On Plaintiffs' Motion for Review of Administrative Determination Upon Agency Record

[Affirmed in part; remanded in part.]

(Dated August 9, 1983)

Bruce M. Frey, for the plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

Re, *Chief Judge:* Plaintiffs, on behalf of former employees of the Dana Corporation's Marion, Indiana plant, challenge a determination by the Secretary of Labor which denied them certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976 & Supp. IV 1980). In substance the Secretary found that only those workers in Departments 225 and 230, which produced journal crosses and bearing races, met the criteria for eligibility set forth in section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1976). The Secretary found that production workers other than those in the two certified departments, and service workers who provided ancillary and support services to both certified and non-certified departments, did not meet the eligibility criteria.

Plaintiffs content that all workers at the plant are entitled to receive trade adjustment assistance benefits because they were separated from employment due to increased imports of "articles like or directly competitive" with articles produced at the Marion plant. They assert that the Secretary's determination, that some of the workers employed at the plant are not eligible for benefits, is not supported by substantial evidence. They further allege that the Secretary's determination violates their constitutional guarantee of equal protection under the law.

After reviewing the original and supplemental administrative records, and the arguments and briefs of the parties, the court concludes that, as to the production workers other than those in Departments 225 and 230, the Secretary's denial of certification of eligibility was made in accordance with law and is supported by substantial evidence contained in the administrative record. As to the service workers, this action is remanded to the Secretary of Labor for redetermination in accordance with this opinion.

FACTS

On February 26, 1980, Local 113 of the Allied Industrial Workers of America filed with the Department of Labor's Office of Trade Adjustment Assistance (OTAA) a petition requesting certification of eligibility for trade adjustment assistance benefits for all employees of the Dana Corporation's Marion, Indiana plant. Subsequently, OTAA published a Federal Register notice indicating that the petition had been received, that an investigation had been commenced, and that interested parties had ten days within which to request a public hearing. 45 Fed. Reg. 15731 (1980).

OTAA's investigation was conducted by mail. It obtained from the Dana Corporation's Headquarters information about the corporation, the work force, production, and use of imports at the Marion plant. Additionally, OTAA conducted a survey of major American automotive manufacturers to determine the aggregate domestic production and consumption of drive shafts and universal joints, the kinds of articles produced at the Marion plant. OTAA's investigators did not visit the Marion plant, nor was a public hearing requested or held.

The investigation disclosed that the Dana Corporation manufactures and markets a variety of automotive products. At the Marion plant, Dana manufactures components used in the production of drive shafts and universal joints, such as journal crosses, bearing races, stub shafts, sleeves, end yokes, mid-ship stubs, bolts and lock straps. OTAA also found that Dana imported significant quantities of some components for use in it Marion plant. Most of the component parts are assembled at the Marion plant into drive shaft units and universal joint kits for light trucks and then sold to various American automobile manufacturers. A smaller number of components are sold, assembled and unassembled, for use in the manufacture of heavy duty trucks.

The investigation also disclosed that the principal components of the drive shafts and universal joint kits were journal crosses and bearing races. The Marion plant's imports of journal crosses increased in value from fiscal year 1978 (ending August 31, 1978) to fiscal year 1979, and in the first half of fiscal year 1980 compared with the same period in fiscal year 1979. Imports of bearing races also increased during the first half of fiscal year 1980 compared with the first half of fiscal year 1979. During these same time periods, the number of journal crosses and bearing races produced at the Marion plant decreased. The imported journal crosses and bearing races are identical to those produced at the Marion plant, and represented a substantial proportion of total plant production during fiscal years 1979 and 1980.

A survey of the major domestic motor vehicle manufacturers revealed that importations of assembled universal joints and drive shafts were negligible. Although the absolute number of these imports increased during 1977–79, the rate of imports as compared to domestic products during 1979 was approximately 2 percent. The survey also indicated that after increasing during 1977 and 1978, total domestic production of universal joints and drive shafts declined during 1979.

OTAA's investigative report showed that the largest portion of the Marion plant's direct labor costs are attributed to the production of component parts. The assembly of the components into drive shafts and universal joint kits accounts for a much smaller percentage of labor costs. Because the workers move among various work stations according to the production schedule, they are not readily identifiable by product lines. Moreover, layoffs and recalls are based on a plant-wide seniority system in which "bumping" between departments is permitted.

Employment at the Marion plant declined during the fourth quarter of fiscal year 1979 and continued to decline during the first half of 1980. Temporary layoffs began in July 1979 and continued through February 1980 when plaintiffs filed their petition for certification.

Basing his findings on the foregoing information, the Secretary concluded that:

> [I]ncreases of imports articles like or directly competitive with journal crosses and bearing races produced at the Marion, Indiana plant of the Dana Corporation contributed importantly to the decline in sales or production and to the total or partial separation of workers at that plant. In accordance with the provisions of the Act, I make the following certification:
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> All workers of the Marion, Indiana plant of the Dana Corporation engaged in employment related to the production of journal crosses and bearing races who became totally or partially separated from employment on or after June 1, 1979

are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

On July 3, 1980, plaintiffs filed a request for administrative reconsideration contending that OTAA's failure to conduct a field investigation deprived them of an opportunity to explain the full circumstances of their petition. Plaintiffs adverted that OTAA had not considered the effect of imports of components other than journal crosses and bearing races, and claimed that increased imports were having an adverse impact on *all* workers at the plant.

On August 4, 1980, OTAA granted plaintiffs' request. Prior to the granting of the request for reconsideration, OTAA sought additional information from plaintiffs' employer. Dana responded by sending additional copies of the material previously submitted, together with additional information as to quantities of imported end yokes, mid-ship stubs and stub shafts.

At approximately the same time, the Indiana State Employment Service, the state agency responsible for implementing the certification decision, sought clarification of OTAA's certification, stating that it "cannot be interpreted by this agency as to who is covered and who is not."

In turn, a similar request for assistance in the interpretation and application of the certification determination was made by OTAA's regional office in Chicago, Illinois. The regional office suggested that, since journal crosses and bearing races are integral parts of universal joints and drive shafts "the [state] agency, employer and claimants are unable to comprehend the rationale for not certifying the universal joints and drive shafts."

For the purpose of clarifying its certification, on August 28, 1980, OTAA issued a memorandum stating that the certification covered only Departments 225 and 230.

Thereafter, the Secretary rendered a negative determination on reconsideration. In the course of his determination, the Secretary noted plaintiffs' contentions that (1) imports of drive shaft components, other than journal crosses and bearing races, for use at Dana's Marion plant had caused layoffs; and that (2) Dana lost business due to increased imports of vehicles already fitted with drive shafts. Despite these claims, the Secretary found that, with respect to universal joints and drive shafts, the investigation disclosed that the "increased import" criterion of section 222(3) was not satisified because the ratio of imports to domestic production for those articles was approximately 2 percent in 1979; and that Dana did not import universal joints or drive shafts; but did import the components for them. 45 Fed. Reg. 62584 (1980).

The Secretary also found that the imports of components, other than bearing races and journals, are "generally directly related to production of such components at the Marion plant. For example, as component production increases or decreases, imported components increase and decrease, respectively."

Finally, the Secretary found that there was no validity to plaintiffs' contention that Dana lost business due to increased imports of motor vehicles already fitted with drive shafts, since under the applicable case law a finished article, *i.e.,* the motor vehicle, cannot be considered like or directly competitive with its component parts, *i.e.,* drive shafts and universal joints. *See United Shoe Workers of America, AFL-CIO* v. *Bedell,* 506 F.2d 174 (D.C. Cir. 1974).

Plaintiffs then commenced this action. Subsequent to the court's order directing that this action be submitted for determination as prescribed by Rule 56.1, plaintiffs moved to supplement the administrative record. Plaintiffs alleged that the November 5, 1981 decisions of the appeals referee for the Indiana Employment Security Division, "as to whether individual plaintiffs herein and other employees * * * are eligible" for trade adjustment assistance benefits, are relevant to the court's consideration of the administrative record.

The court denied plaintiffs' motion and remanded the action to the Secretary for further administrative consideration in light of plaintiffs' offer of new evidence. *Abbott* v. *Donovan,* 3 CIT 54 (1982).

In compliance with the court's order, the Secretary, on April 9, 1982, submitted his redetermination. Finding in the Indiana decisions no new evidence relevant to his initial determination, the Secretary affirmed it. He again found that workers in Departments 225 and 230 of the Marion plant produced, respectively, bearing races and journal crosses; that significant increases in company imports of these articles were associated with decreased production of bearing races and journal crosses; and that these increased imports "contributed importantly" to the layoffs only of the workers in those two departments. 47 Fed. Reg. 16434 (1982).

This court may review a decision by the Secretary of Labor which denies a petition for certification of eligibility for trade adjustment assistance benefits to assure that the Secretary's determination is in accordance with law, and is supported by substantial evidence contained in the administrative record. Trade Act of 1974, § 284, 19 U.S.C. § 2395(b) (Supp. IV 1980).

Pursuant to section 222 of the Act, in order to certify plaintiffs as eligible for trade adjustment assistance benefits, the Secretary of Labor's investigation must disclose:

> (1) That a significant number or proportion of the workers in such workers' firms or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
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> (2) That sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) That increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

If any of these conditions does not exist, the Secretary must deny certification.

Questions Presented

Four questions are presented for consideration by the court:

(1) Whether OTAA's failure to conduct a field investigation was an abuse of discretion;

(2) Whether all employees at the Marion plant constituted an appropriate subdivision of the firm;

(3) Whether increased imports of journal crosses and bearing races contributed importantly to the layoffs of service workers at the Marion plant; and

(4) Whether, in not certifying the production worker plaintiffs as eligible for trade adjustment assistance benefits, the Secretary violated their constitutional guarantee of equal protection of the law.

It is the determination of the court that the Secretary's failure to conduct a field investigation into plaintiff's petition was not an abuse of discretion; that the Secretary's denial of certification as to all production workers, other than those in Departments 225 and 230, is affirmed; that the Secretary's determination as to service workers is not supported by substantial evidence in the administrative record and thus is remanded for redetermination; and that the Secretary's distinction between classes of production workers has a rational basis in law and is not violative of plaintiff's constitutional guarantee of equal protection.

OTAA's INVESTIGATION

It has been recognized that administrative officials must have the necessary flexibility to discharge their official responsibilities under the worker adjustment assistance program. While the court may identify flaws in the methodology used by the Secretary, it is not the court's function to substitute its own method of analysis for that of the Secretary. Rather, the court will substantially defer to the Secretary's "chosen technique, only remanding a case if that technique is so marred that the Secretary's finding is arbitrary or of such nature that it could not be based on 'substantial evidence.'" *United Glass & Ceramic Workers* v. *Marshall,* 584 F.2d 398, 405 (D.C. Cir. 1978).

This court first considered the Secretary of Labor's duty to investigate petitions for certification of eligibility for trade adjustment assistance benefits in *Woodrum* v. *Donovan,* 4 CIT 46, 544 F. Supp. 202 (1982), *rehearing denied, Woodrum* v. *Donovan,* 4 CIT 130 (1982). There, this court held that the Trade Act of 1974 requires the Secretary of Labor to investigate each properly filed petition. Yet, the court held that the nature and extent of an investigation are matters "which properly rest within the sound discretion of the Secretary." *Woodrum,* 4 CIT 46 at 51.

Section 248 of the Trade Act of 1974, 19 U.S.C. § 2320 (1976), authorizes the Secretary of Labor to prescribe regulations for the implementation of the trade adjustment assistance program. In particular, 29 C.F.R. § 90.12 (1980) provides that the Director of the Office of Trade Adjustment Assistance shall initiate such investigation as he determines to be necessary and appropriate. The investigation may include one or more field visits to verify information furnished by the plaintiffs and to elicit other relevant information.

The administrative record discloses that OTAA conducted its investigation by mail, gathering necessary information, such as the total production, the size of the work force, and the use of imports at the Marion plant. Additionally, OTAA obtained information from major American automobile manufacturers to determine the aggregate domestic production and consumption of drive shafts and universal joints.

Plaintiffs do not maintain that OTAA must conduct a field investigation for every petition. Rather, they allege that in this situation a field investigation was necessary and appropriate. Without the field investigation, plaintiffs contend they were deprived of an opportunity fully to explain the circumstances of their petition. However, plaintiffs have failed to indicate what useful information would have been gathered from a field investigation that was not otherwise obtained. Moreover, it appears that, under the circumstances presented, OTAA's investigation yielded an accurate picture of the relative importance of imports. The court notes that plaintiffs were advised of their right to request a public hearing at which they could present evidence in support of their petition. Yet, plaintiffs never exercised that right, and no public hearing was held.

In conducting its investigation by mail, OTAA applied what it considered a reasonable means of ascertaining a causal link between imports and separations at the Marion plant. In view of plaintiffs' inability to show the appropriateness of and need for a field investigation, the court cannot say that OTAA abused its discretion in conducting its investigation by mail.

Appropriate Subdivision

Plaintiffs next assert that all workers at the Marion plant are engaged in employment related to the production of the certified articles, and that, therefore, the Secretary erred in treating Departments 225 and 230 as discrete subdivisions of the Marion plant. In support of their contention, plaintiffs point out that, generally, the two certified articles, journal crosses and bearing races, are not marketed by the Dana Corporation as finished products, but are the principal components used by Dana in the manufacture of drive shafts and U-joint kits. According to plaintiffs, since the certified articles are the principal component parts of the Marion plant's finished products, all of the plant's workers should have been certified as eligible for trade adjustment assistance benefits.

Under the Trade Act of 1974, the Secretary of Labor may certify a group of workers as eligible for trade adjustment assistance benefits only upon finding that the workers in a "firm or an appropriate subdivision of the firm" have been adversely affected by "increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof * * *." Trade Act of 1974, § 222(3), 19 U.S.C. § 2272(3) (1976). By asserting that all workers at the Marion plant should have been certified, the plaintiffs in this case essentially challenge the Secretary's determination that for the purpose of determining eligibility for benefits, Departments 225 and 230, rather than the entire Marion plant, are "appropriate subdivisions" of the Dana Corporation.

This assertion by plaintiffs ignores the now well-settled principle that determinations of what constitutes an appropriate subdivision must be made along product lines. *See Pemberton* v. *Marshall,* 639 F.2d 798, 801 (D.C. Cir. 1981); *Lloyd* v. *U.S. Department of Labor,* 637 F.2d 1267, 1275 (9th Cir. 1980); *U.A.W.* v. *Marshall,* 584 F.2d 390, 396–98 (D.C. Cir. 1978); *Paden* v. *U.S. Department of Labor,* 562 F.2d 470, 475 (7th Cir. 1977). The Secretary of Labor may certify as eligible for trade adjustment assistance benefits only those workers who are employed in the subdivision that produces the article that is adversely affected by imports of "like or directly competitive" articles.

The principle that certification determinations must be made along product lines was established in *Paden* v. *U.S. Department of Labor.* In that case, former employees of the Motorola company's Quincy plant, which produced color televisions, monochrome televisions and automotive sound equipment, petitioned for certification of eligibility for trade adjustment assistance benefits. The Secretary of Labor determined that, since importations of only color televisions had increased during the preceding year, only those employees at the Quincy plant who were involved in the production of color televisions were eligible for benefits. The court in *Paden* expressly rejected the petitioners' contention that all employees of the Quincy plant should be certified, noting that to accept it "would in practicality destroy all distinctions between product lines when throughout the Trade Act Congress carefully limited relief to injury from articles 'like or directly competitive.' " 562 F.2d at 475.

The reasoning of *Paden* was adopted in *Pemberton* v. *Marshall,* where the court addressed the question whether the workers at a facility operating in conjunction with a certified subdivision were also eligible for trade adjustment assistance benefits. In that case, the workers at Bethlehem Steel's Baltimore Yards contended that they should be considered part of a certified subdivision which included Bethlehem Steel's Sparrows Point Shipyard. The court stated: "The only relevant concern in determining whether a facility is part of the appropriate subdivision is whether it also produces the articles in question." 639 F.2d at 801. The court then went on to hold that since the Baltimore Yards only repaired ships, it did not produce an article which was like or directly competitive with imported ships and could not be included in an appropriate subdivision with the Sparrows Point Shipyard, which manufactured ships.

The application of these precedents to the instant case compels the court to approve the Secretary's determination that Departments 225 and 230 of the Marion plant are appropriate subdivisions of the Dana Corporation. Only the workers in those two departments are engaged in the production of articles which are like or directly competitive with the imported articles that are causing the injury. While the other departments of the Marion plant do operate in conjunction with the certified departments, *Pemberton* teaches that the "only relevant concern" in determining whether they are part of the appropriate subdivision is whether they also produce the articles in question. In this case it is clear that the other departments of the Marion plant, other than Departments 225 and 230, do not produce articles which have been adversely affected by increased imports of like or directly competitive articles.

SERVICE WORKERS

The next question is whether the service workers who provided ancillary and support services to both certified and non-certified departments are eligible for trade adjustment assistance.

Here, the record reveals that the service workers who provided ancillary and support services were tool makers, tool and cutter grinders, laborers, millwrights, electricians, machine repairers, stock chasers (fork-lift drivers), salvage inspectors, oilers, metal lab technicians, central storekeepers, inspectors, quality control inspectors, garage mechanics and those employed in the shipping department. The record further discloses that these service workers performed work indispensable to the production of the two articles which were adversely affected by increased imports. Indeed, the Secretary agreed with the conclusion of the Indiana referee "that without the performance of such auxiliary functions no journal crosses or bearing races would be produced."

On their face the adjustment assistance provisions of the Trade Act of 1974, and in particular section 222, are silent regarding coverage for service workers. The accompanying legislative history is similarly quiescent. Hence, the court must accord substantial deference to the intepretation of the statute by the agency charged with its administration. *Woodrum* v. *Donovan,* 5 CIT 191 (1983) (quoting *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32 (1981)). The court will sustain the agency's interpretation of the statute where it has a rational basis in law, even though the court might have reached a different interpretation. *John V. Carr & Son, Inc.* v. *United States*, 69 Cust. Ct. 78, 86 C.D. 4377, 347 F. Supp. 1390, 1396 (1972), *aff'd.*, 61 CCPA 52, C.A.D. 1118, 496 F.2d 1225 (1974). Nevertheless, the court will reject the agency's interpretation or application of a statute when it is inconsistent with the legislative purpose of the statute or frustrates Congress' intent. *Woodrum*, 5 CIT 191 at 194 (quoting *Federal Election Commission*, 454 U.S. at 32).

According to the Secretary's interpretation of the Trade Act of 1974, service workers may not be certified as eligible for trade adjustment assistance benefits unless there was an important causal nexus between increased imports and the layoff of service workers. That nexus is deemed to exist if a substantial amount of the service workers' activity was directly related to the production of the import-impacted article. For five years, the Department of Labor has implemented its interpretation of the statute by requiring that at least 25% of the service workers' activity be expended in service to the subdivision which produces the import-impacted article.

In this case, the Secretary determined that the service workers at the Marion plant were not eligible for benefits because, in the words of the Secretary: "direct labor costs attributable to journal cross and bearing race production were significantly less than 25 percent of direct labor costs for total component production. In other words, the contribution of the service departments to Departments 225 and 230 accounts for significantly less than 25 percent of their contribution to all products in the Marion Plant." On this basis the Secretary concluded that "increased imports did not 'contribute importantly' to the layoffs among workers in the service departments."

This analysis suggests that the Department of Labor compiled data indicating how much of the service workers' activity was expended in service to the certified departments. However, if such data was compiled, the Secretary neglected to include it in the administrative record. Without any supporting data, the Secretary's statement that "significantly less than 25 percent" of the service workers' activity is expended in service to the certified departments is no more than an allegation. Accordingly, the court must hold that the Secretary's determination as to the service workers is not supported by substantial evidence contained in the administrative record and this portion of the action will be remanded.

In remanding this portion of the action for redetermination, the court notes that even if the needed data is added to the administrative record, there is still a flaw in the Secretary's reasoning regarding the service workers at the Marion plant. The Secretary states that, since direct labor costs attributable to production of the certified component are significantly less than 25 percent of the direct labor costs attributable to total component production, then the service workers' contribution to the certified departments must be significantly less than 25 percent of their contribution to the entire plant. This deduction is accurate only if the efforts of the service departments are evenly distributed throughout the plant. While the service departments indeed distribute their services evenly through the plant, it is also possible that the certified departments are "service intensive," that is, they may require a higher percentage of services than do other departments. The court expects that the Secretary, in his redetermination, will account for the possibility that services are not distributed evenly throughout the plant.

EQUAL PROTECTION

There remains the question whether the Secretary's determination resulted in dissimilar treatment of similarly situated workers without a rational basis in violation of their constitutional guarantee of equal protection of the law.

Plaintiffs contend that the Secretary's interpretation of section 222 created two disparate classes of production workers at the Marion plant. The first class consists of the employees in Departments 225 and 230, who were certified as eligible for trade adjustment assistance benefits. The second encompasses the plant's remaining production workers who were not certified.

Plaintiffs maintain this distinction "creates a situation where two workers who perform their duties daily, side by side, did not receive the same outcome because they are assigned to differently designated departments within the same production facility." The Secretary defends the distinction on the basis that the employees in the second class did not produce articles, namely bearing races and journal crosses, that were adversely affected by increased imports of like or directly competitive articles.

Recently, the court focused on this question in the *Woodrum* case. There, plaintiffs, maintained that the Secretary's denial of certification resulted in a discriminatory application of the worker adjustment assistance provisions of the Trade Act of 1974. In particular, plaintiffs alleged that employees of automobile dealerships controlled or substantially owned by a domestic automobile manufacturer were granted certification, while employees of independently owned dealerships, such as themselves, were denied certification.

In passing on the equal protection claim, this court held that the differentiation in treatment, assuming all other eligibility requirements of section 222 were satisfied, resulted not from an arbitrary, capricious or improper distinction by the Secretary, but rather from a proper interpretation of the statute. The court further noted that though a classification lacks "mathematical precision, or may in practice result in some inequality, the court will sustain it, so long as the classification has a rational basis." *Woodrum*, 5 CIT 191 at 200–201 (citations omitted).

Similar considerations are applicable here. As in *Woodrum*, the Secretary's denial of certification for production worker plaintiffs was based on their failure to satisfy the criterion of section 222(3), namely that they produce an import-impacted article. The record clearly shows that bearing races and journal crosses were the only articles produced at the Marion plant directly affected by increased imports of like or directly competitive articles. Thus, it was reasonable for the Secretary to conclude that those employees in Departments 225 and 230 should be certified, for they alone constituted the class of intended beneficiaries of the trade adjustment assistance program.

Applying the rationale of *Woodrum*, the distinction in classes established by the statute and implemented by the Secretary meets the rational basis standard. Hence, insofar as the distinction applies to production workers, other than those employed in Departments 225 and 230, it is upheld.

CONCLUSION

In summary, it is the determination of the court that, as to the service workers who provide ancillary and support services to both certified and non-certified departments within the plant, the Secretary's denial of certification for eligibility for trade assistance, is not based on substantial evidence and is not in accordance with law. For that reason, as to the service workers, this matter is remanded to the Secretary for a more detailed inquiry and for clarification of the reasons underlying the determinations.

Further, it is the determination of the court that the remainder of the Secretary's determination is affirmed.

The Secretary shall certify the record and report to the court the results of the further proceedings within seventy-five days from the date of the entry of this decision and order.

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569 F. Supp. 883

SANDERS W. GROPPER, PLAINTIFF, v. RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 81-8-01066

Before RE, *Chief Judge*.

On Plaintiff's Motion for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed.]

(Decided August 16, 1983)

Sanders W. Gropper, pro se.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

Re, *Chief Judge:* Plaintiff, on behalf of the former employees of Foxco Industries Limited, New York, New York, challenges a determination of the Secretary of Labor denying certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. §§ 2101–2487 (1976 & Supp. IV 1980). In substance, the Secretary of Labor found that the former employees of Foxco were employed by a firm that did not produce an article "like or directly competitive" with an article adversely affected by increased imports within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) 1976).

Plaintiff asserts that an increase in the importation of knit fabric *garments* has had a negative effect upon domestic production of a *component, i.e.,* finished fabric for domestically-manufactured garments. Essentially, plaintiff complains that an end product, knit fabric garments, is "like or directly competitive" with a component, finished fabric. After reviewing the administrative record, and the arguments and briefs of the parties, the court holds that the Secretary's denial of certification is supported by substantial evidence and is in accordance with law.

On February 13, 1981, plaintiff and two other employees of Foxco filed a petition with the Office of Trade Adjustment Assistance (OTAA) for certification of eligibility to apply for trade adjustment assistance on behalf of the workers at Foxco. Pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a) (1976). OTAA published a notice of the filing of the petition and the initiation of an investigation. 46 Fed. Reg. 15620 (1981).

OTAA's investigation disclosed that finished fabric is cloth which is ready to be cut into finished products such as apparel goods and home furnishings. Textile finishers buy gray fabric from weaving or knitting mills and treat the fabric to make it more attractive or serviceable. There are three types of fabric finishers, *i.e.,* textile mills, converters and commission printers. Foxco, as a converter, purchased yarn which it sent to commissioned knitters, who, after knitting the yarn into fabric, sent it to commissioned finishers under Foxco's direction. Foxco maintained an inventory of single, double, and sweater knit fabrics which were used to fill orders from its customers in the apparel industry on an as-needed basis. Foxco's production was based on orders received, and it did not import knit fabric. The firm operated as a fabric converter until it ceased operation in December 1980.

In conducting its investigation along product lines, OTAA conceded that knit fabric garments are made from finished fabric. Even so, it found that those garments are not "like or directly competitive" with finished fabric. Hence, OTAA only considered imports of finished fabric in determining the existence of import injury to Foxco's workers.

The investigation further disclosed that all types of finished fabric are "like or directly competitive" with the finished fabric produced by Foxco; that imports of all finished fabric were 32.2 percent lower in 1979 than they were in 1978, and 2.9 percent lower during the first nine months of 1980 than imports for the comparable period in 1979; and that there was a net decrease of 14.7 percent in imports between 1975 and 1979. During this same period, exports of finished fabric from the United States were increasing. Moreover, the ratio of imports to domestic production did not exceed 2.2 percent for the four-year period.

OTAA thus concluded that plaintiff's claim that increased imports of knit fabric garments contributed importantly to the downturn in Foxco's sales and production and the resultant layoff of the firm's employees was without merit.

Based on OTAA's findings, the Secretary issued a negative determination on plaintiff's petition stating that the investigation revealed that "[a]ggregate U.S. imports of finished fabric did not increase as required for certification" under section 222(3). 46 Fed. Reg. 32528, 32529 (1981).

Plaintiff requested administrative reconsideration of the Secretary's negative determination. In dismissing plaintiff's application for reconsideration, the Secretary explained that plaintiff's contention that imports of foreign-made knit fabric garments adversely impacted domestic production of finished fabric used in the manufacture of domestically-made garments is not disputed. Nevertheless, under the terms of the governing statute, certification can only be had where there is a finding of increased imports of the article "like or directly competitive" with that produced by Foxco. The Secretary reiterated that the article in question is finished fabric and not imported knit fabric garments, which are end products incorporating the component material produced by Foxco. Based on an absolute decrease in imports of finished fabric, the Secretary found no new grounds for reconsideration.

On August 12, 1981, plaintiff commenced this action by filing a letter complaint seeking judicial review of the Secretary's final determination.

Subsequently, pursuant to plaintiff's motion for a review of the administrative determination upon the agency record, the court ordered the parties to brief the relevant issues including:

> (1) Whether imported knitted garments are "like or directly competitive," within the meaning of Section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3), with articles produced by plaintiff's employing firm; and
>
> (2) Whether the Secretary of Labor's findings and resulting determination denying plaintiff's certification of eligibility for trade adjustment assistance pursuant to Section 223 of the Trade Act of 1974, 19 U.S.C. § 2273, are supported by substantial evidence as contained in the certified administrative record filed with this court.

Section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1976), requires that the Secretary shall certify a group of workers as eligible to apply for adjustment assistance if he determines:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
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> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of *articles like or directly competitive* with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. (Emphasis added.)

The Secretary denied plaintiff's petition because it failed to satisfy the third eligibility criterion, *i.e.*, plaintiff's employer, Foxco, did not produce an article "like or directly competitive" with an article adversely affected by increased imports.

The Trade Act of 1974 empowers the court to review a decision by the Secretary denying a petition for certification of eligibility for trade adjustment assistance benefits to assure that the determination is supported by substantial evidence contained in the administrative record, and was made in accordance with law. Trade Act of 1974, § 284(b), 19 U.S.C. § 2395(b) (Supp. IV 1980).

Plaintiff contends that the increase in importation of knit fabric garments has contributed importantly to Foxco's decline in sales and production of finished fabric for domestically-manufactured garments and the resultant layoff of the firm's employees. Plaintiff submits that every yard of fabric produced for the apparel industry is produced for the specific purpose of manufacturing a garment. Hence, plaintiff contends that, as a practical matter, "[f]abric is made to be used in garments and you cannot separate garment manufacturers from fabric manufacturers." Plaintiff asserts that the relationship between the knit fabric and knit apparel industries is so close that the two should be considered a single entity for the purposes of determining eligibility under section 222(3).

Defendant admits that finished fabric is made to be used in knit fabric garments, among other articles. Nevertheless, defendant contends that garments which are made from finished fabric are not "like or directly competitive" with the finished fabric itself within the meaning of the governing statute. More specifically, the Secretary maintains that the phrase "like or directly competitive" in section 222(3) does not embrace finished fabric since finished fabric is only a component of the import-impacted product, knit fabric garments.

The question presented, therefore, is whether, in finding that the article produced, *i.e.*, finished *fabric*, is not "like or directly competitive" with *garments* made from finished fabric, the Secretary correctly interpreted and applied section 222(3). It is the determination of the court that a component, such as finished fabric, is not "like or directly competitive" with an end product, such as knit fabric garments, within the meaning of section 222(3).

Prior cases have examined the meaning of the phrase "like or directly competitive." *United Shoe Workers of America, AFL-CIO* v. *Bedell*, 506 F.2d 174 (D.C. Cir. 1974); *Machine Printers and Engravers Association of United States* v. *Marshall*, 595 F.2d 860 (D.C. Cir. 1979); *Morristown Magnavox Former Employees* v. *Marshall*, 671 F.2d 194 (6th Cir. 1982).

While the *Bedell* case arose under the Trade Expansion Act of 1962, the predecessor act of the Trade Act of 1974, both statutes contained identical provisions that require a finding of increased imports of "like or directly competitive" articles. In *Bedell*, workers engaged in the production of counters for women's shoes petitioned the United States Tariff Commission for adjustment assistance under the provisions of the 1962 Act. The Commission found that counters provided a necessary reinforcement for heels and were generally purchased by shoe manufacturers from independent suppliers. The workers claimed that increased imports of wholly assembled women's shoes had severely reduced domestic production of shoes and, consequently, diminished the demand for shoe counters. The Tariff Commission found that imports of counters for women's shoes were negligible, and consequently, rejected the workers' contention that imported women's footwear containing counters was "directly competitive" with counters.

The district court upheld the determination of the Tariff Commission. In affirming, the Court of Appeals held that a firm producing a *component* of a finished article, which is adversely affected by increased imports of the finished article, is not a firm producing an article "like or directly competitive" with the imported article. The court relied upon its review of legislative history and preceding analogous provisions. In the course of its examination the court stated:

> When Congress enacted the Trade Agreements Extension Act of 1951, it adopted the "like or directly competitive" formula as the criterion for invoking escape-clause protection. The first congressional indication of the meaning of this phrase came during the debates on the Trade Agreements Extension Act of 1955. Senator Morse introduced an amendment to the 1951 Act that, in his view, would have given producers of "raw materials and components" the procedural right to be heard before the Tariff Commission. On its face, the Morse amendment would have afforded component parts manufacturers the same relief as manufacturers of finished products, even if the "like or directly competitive" article entered the United States as a component of a finished product. * * * Congress rejected the Morse amendment.

506 F.2d at 180–181 (footnotes omitted).

The court further noted that, in enacting the Trade Expansion Act of 1962, Congress intended the phrase "like or directly competitive" to have the same meaning it had under the 1951 Act. In particular, the court stated:

> Although the decisions in this area have all occurred within the last three years, their roots extend deep in adjudicative history. Nearly forty years ago, the Court of Customs and Patent Appeals interpreted the phrase "like or similar" and held that an imported article was "like" a domestic article only if it had "the same or nearly the same appearance, qualities or characteristics." The Tariff Commission took the same position shortly after "like or similar" was legislatively changed to "like or directly competitive" in 1951. In a 1952 case, the Commission concluded that an imported glace cherry was not "like or directly competitive" with a domestic sweet cherry. It held that "[t]he domestic industry producing glace cherries [could] not properly be considered as including the cherry growers," the producers of domestic sweet cherries.

506 F.2d at 184-185 (footnotes omitted). From the foregoing legislative history and preceding analogous provisions, it is clear that Congress did not intend to expand the scope of coverage in the manner suggested by plaintiff.

Judicial construction of the phrase "like or directly competitive" was reaffirmed in the *Machine Printers and Engravers* case. In that case, the union, on behalf of certain of its members employed by independently-owned firms engaged in the business of engraving copper or plastic rollers and rotary screens for use by domestic textile manufacturers to print designs on fabrics, challenged the Secretary's denial of certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974.

The union did not claim that the workers' jobs, or their employers' sales were adversely affected by increased imports of engraved rollers or screens, or that any increase in imports of those articles had occurred. Rather, the union claimed that its members were losing work because increased imports of textiles had reduced the demand for engraved rollers and rotary screens.

The court held that despite the adverse impact of textile fabric imports upon the workers' employers, the fabric imports plainly were not "like or directly competitive" with engraved rollers or rotary screens. More specifically, the court found the rollers and screens not to be "interchangeable with nor substitutable for the domestic textile fabrics" whose market suffered from imports. 595 F.2d at 862. It thus concluded, on the basis of *Bedell*, that the trade adjustment assistance provisions, as written, did "not authorize the Secretary to extend relief to workers employed by roller and screen engravers whose business has been adversely affected by increased imports of textile fabrics." *Ibid.*

It is clear that the rationale of the *Bedell* and *Machine Printers and Engravers* cases is applicable to the present case. Like the heel counters in *Bedell,* and the engraved rollers and rotary screens in *Machine Printers and Engravers,* the finished fabric in the present case is a *component* of a finished article, knit fabric garments, that has been adversely impacted by increased imports. Hence, the finished fabric is not embraced by the phrase "like or directly competitive" in section 222(3), since it is neither interchangeable with, nor substitutable for the import-impacted knit fabric garments.

In the *Morristown Magnavox* case, the court, also relying upon *Bedell,* held that workers producing components of television sets at a domestic plant, which was adversely affected by importations of completed color television sets from Japan, were ineligible for trade adjustment benefits under section 222. It stated:

> * * * component parts of a television set are not "like" a completed television set within the meaning of the statute at issue and * * * imports of fully completed television sets are not directly competitive with the manufacture of printed circuit boards, flybacks and deflection yokes.

671 F.2d at 198.

The court, in affirming the Secretary's determination, made the following pertinent observation:

> In holding that "like" must be construed as we do today, we are mindful of the remedial purpose of the adjustment assistance provisions. Those provisions are designed to extend relief to manufacturers and workers who, in consequence of governmental action, find themselves idle or jobless. Such remedial legislation should be construed broadly to effectuate its purpose. But we cannot attach to a statute any objective that would negate the limits clearly intended by the legislature. Congress has made a policy decision and drawn a line; our duty is to give the language of the statute a meaning that will carry out that policy. The result may appear harsh in this day of high unemployment and rising cost of living, but the remedy for congressional policies that do not extend beyond lawful bonds is in the legislature.
>
> While it seems clear to us that the petitioners here may have suffered loss of jobs from the general impact on the television market of foreign competition, it does not appear that Congress has ever provided adjustment to them or people in their general classification. The restriction in the bill of such adjustment to job loss resulting from competition of "like or directly competitive" products has been repeatedly criticized and debated in Congress. But to date all proposals to eliminate or mitigate these two restrictions have been defeated.

671 F.2d at 197.

In light of the pertinent statutory language, legislative history, and judicial precedents, the court holds that:

(1) the Secretary's finding that there was a decline in imports of finished fabric, and that imports of foreign-made knit fabric garments have had a negative effect on domestic produc-

tion of finished fabric, during the concerned period, is supported by substantial evidence in the record;

(2) the imported knit fabric garments are not "like or directly competitive," within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3), with articles produced by plaintiff's employing firm; and

(3) that the Secretary of Labor's findings and resulting determination denying plaintiff's certification of eligibility for trade adjustment assistance pursuant to section 223 of the Trade Act of 1974, 19 U.S.C. § 2273, are supported by substantial evidence as contained in the certified administrative record filed with the court.

Accordingly, it is the determination of the court that the Secretary of Labor's denial of certification is supported by substantial evidence and is in accordance with the trade adjustment assistance provisions of the Trade Act of 1974. The determination of the Secretary is therefore affirmed.

Melamine Chemicals, Inc., plaintiff *v.* United States, defendant

Court No. 80-6-00878

Before Landis, *Judge.*

Defendant's Motion, Brought Pursuant to an Order To Show Cause, Seeking To Stay the Department of Commerce From Filing a Report Ordered by This Court on March 25, 1983 (Slip Op. 83-21) Is Denied. The Department of Commerce Is Further Directed To Report to This Court in Compliance With Slip Op. 83-21 (March 25, 1983)

[Defendant's motion for a stay is denied. The Department of Commerce is ordered to report to this Court in compliance with Slip Op. 83-21 (March 25, 1983).]

(Decided August 16, 1983)

Baker & McKenzie (*Bruce E. Clubb* on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Francis J. Sailer* on the motion), for the defendant.

Landis, Judge: Upon reading and filing of defendant's motion for an order to show cause, and upon plaintiff's opposition thereto, it is hereby

Ordered, that defendant's motion for an order to show cause is denied; and it is further

Ordered, that the Department of Commerce report to this Court in accordance with Slip Op. 83-21 (March 25, 1983) within thirty (30) days of entry of this order; and it is further

Ordered, that this order shall supersede the time requirements for the Department of Commerce to report on compliance with Slip Op. 83-21 (March 25, 1983).

570 F. Supp. 51

ARMCO, INC. & CF&I STEEL CORPORATION, PLAINTIFFS v. UNITED STATES, DEFENDANT AND AH JU STEEL CO., LTD., ET AL., INTERVENORS

Before FORD, *Judge.*

Court No. 80-9-01435

On Plaintiffs' Motion for Summary Judgment, Preliminary Injunction, etc. and Defendant's Cross-Motion To Dismiss

[Dismissed.]

(Decided August 22, 1983)

Freeman, Wasserman & Schneider (*Bernard J. Babb* on the brief) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division (*Francis J. Sailer* on the brief); *Michael H. Stein*, General Counsel, United States International Trade Commission, (*Warren H. Maruyama* on the brief) for the defendant.

Daniels, Houlihan & Palmeter (*N. David Palmeter* on the brief) for the intervenors.

FORD, *Judge:* Plaintiffs have instituted this action to review a determination by the United States International Trade Commission that a United States industry has not been materially injured or threatened with material injury by reason of sales of steel wire nails from the Republic of Korea. This matter was originally assigned to the late Judge Scovel Richardson and reassigned following his untimely death.

The Court has before it plaintiffs' motion for summary judgment. Plaintiffs also moved for a preliminary injunction to enjoin the liquidation of all entries made or withdrawn from warehouse on or after May 23, 1980 and before February 2, 1982. In addition, plaintiffs seek to have the action remanded to the International Trade Administration to determine whether any false or fraudulent statements submitted to them influenced their determination published on May 23, 1980 (45 Fed. Reg. 34944). Plaintiffs further request all liquidations of entries made after December 14, 1982 on merchandise entered between May 23, 1980 and February 2, 1982 be set aside and stayed. Defendant has moved to dismiss for mootness.

Section 516A of the Tariff Act of 1930, as amended (19 U.S.C. 1516a) provides, in relevant part:

> (a) Review of determination.
>
> * * * * *
>
> (2) *Review of determinations on record.*
>
> (A) In general. Within thirty days after the date of publication in the Federal Register of—
>
> (i) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B),

* * * * * * *

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations. The determinations which may be contested under subparagraph (A) are as follows:

* * * * * * *

(ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 303, 705, or 735 of this Act [19 USCS § 1303, 1671d or 1673d].

(b) Standards of review.

(1) *Remedy.* The court shall hold unlawful any determination, finding, or conclusion found—

* * * * * * *

(B) in an action brought under paragraph (2) of subsection (a), to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

(2) *Record for review.*

(A) In general. For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 777(a)(3) [19 USCS § 1677f(a)(3)]; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

* * * * * * *

(c) *Liquidation of entries*

(1) *Liquidation in accordance with determination.* Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or the United States Court of Appeals for the Federal Circuit,

not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

(2) *Injunctive Relief.* In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

* * * * * * *

(e) *Liquidation in accordance with final decision.* If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries the liquidation of which was enjoined under subsection (c)(2),

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

Section 735 of the Tariff Act of 1930, as amended (19 U.S.C. 1673(d)) provides, in relevant part:

(b) Final determination by Commission.

(1) *In general.* The Commission shall make a final determination of whether—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1).

Section 771 of the Tariff Act of 1930, as amended (19 U.S.C. 1677) provides, in relevant part:

(7) Material injury.

(A) *In general.* The term "material injury" means harm which is not inconsequential, immaterial, or unimportant.

This case arose out of a self-initiated antidumping investigation by the Department of the Treasury (hereinafter Treasury) as a result of information obtained under the "Trigger Price Mechanism" (hereinafter TPM). Under this procedure prices of certain imported steel mill products were monitored. Sales below the trigger price are regarded as less than fair value sales and are grounds for instituting an antidumping investigation (42 Fed. Reg. 65215 (1977)). On February 20, 1979 Treasury published "Antidumping Proceeding Notice" in the Federal Register, 44 Fed. Reg. 23621. A survey of shipments of Korean steel wire nails from May 1, 1978 to May 28, 1978 resulted in a finding that twenty-two of the thirty-three Korean companies shipping nails to the United States were making sales below the trigger price levels. A formal investigation pursuant to the Antidumping Act of 1921, 19 USC § 160, et seq. (repealed 1979), was instituted. Treasury found there was substantial doubt that importations of steel wire nails from Korea were causing injury to a domestic industry and referred the matter to the United States International Trade Commission (hereinafter Commission) for preliminary determination of injury under Section 201(c)(2) of the Antidumping Act of 1921.

The Commission on April 20, 1979 instituted a preliminary investigation, No. AA1921-Inq.-26, Certain Steel Wire Nails from the Republic of Korea, for the purpose of determining whether there was a reasonable indication of injury to a domestic industry. 44 Fed. Reg. 24649 (April 26, 1979). A thirty-day preliminary inquiry into the state of the domestic steel wire nail industry was instituted and resulted in a finding by the Commission that particularly in western regional markets a reasonable indication of injury justified proceeding with the investigation.

On May 23, 1979 the Commission published its affirmative determination in the Federal Register, 44 Fed. Reg. 29989 (May 23, 1979) finding there was a reasonable indication that an industry in the United States was being injured or was likely to be injured by reason of the importation of certain steel wire nails from Korea. After the affirmative preliminary finding, Treasury's investigation of possible less than fair value sales continued, and on October 26, 1979 it published a notice in the Federal Register, 44 Fed. Reg. 61722 (October 26, 1979) of "Tentative Determination of No Sales at Less Than Fair Value and Tentative Discontinuance of Antidumping Investigation". The notice stated that, with the exception of Murakami Kogyo Co. Ltd., Treasury had found no reasonable grounds to believe that steel wire nails from Korea were being sold at less than fair value. The finding indicated Murakami's dumping margins were minimal and assurances were received that all future sales would be at fair value. Treasury, therefore, tentatively proposed termination of the antidumping investigation.

On January 1, 1980 the Trade Agreements Act of 1979 (Pub. L. 96-39, 93 Stat. 144, et seq.) became effective (19 U.S.C. § 1673 et seq.). The investigation then being conducted by Treasury under the Antidumping Act was terminated and the Government's inquiry resumed by the Department of Commerce (hereinafter Commerce) since the functions of Treasury were transferred to Commerce by the Government Reorganization Act, Reorganization Plan No. 3. Under the transition provisions of § 102(B)(2) of the Trade Agreements Act, supra, Commerce treated Treasury's previous "Tentative Determination" as a preliminary determination under section 733 of the Tariff Act, 19 U.S.C. § 1673(B) (Supp. III 1979).

On May 23, 1980 (45 Fed. Reg. 34141) six Korean companies were found to be selling steel wire nails at less than fair value.[1] Of the six companies all but Kuk Dong Metal Industrial Co. were Japanese owned producers located in Korea's Masan Zone. Eleven other Korean companies were excluded from the investigation since they were not suspected of dumping. Six other companies were found to be selling steel wire nails at fair value or their sales at less than fair value were de minimis. 45 Fed. Reg. 34944–45.

After an investigation (Steel Wire Nails I) made pursuant to Section 735 of the Tariff Act of 1930, 19 U.S.C. 1673(d), the United States International Trade Commission determined, based upon the record made before it, that there was no injury to the domestic industry, and dumping duties were therefore not assessed.

On August 13, 1980, plaintiffs filed an appeal in this court. In its complaint, served on October 1, 1980, plaintiffs seek to have the court overturn the commission's determination as unlawful and unsupported by substantial evidence.

Plaintiffs on February 24, 1981 moved for summary judgment. Plaintiffs in addition moved to disqualify counsel for the Korean intervenors based on the violation of Disciplinary Rule (DR 9-101(B)) of the Code of Professional Responsibility as adopted by the American Bar Association. The latter matter was resolved denying plaintiffs' motion in *Ah Ju Steel Co.* v. *Armco,* 680 F.2d 751 (CCPA 1982).

The Department of Commerce continued to monitor imports of steel wire nails pursuant to the trigger price mechanism program and on July 2, 1981 found that imports of steel wire nails from Korea, Japan and Yugoslavia were being sold at less than the trigger price. The Department of Commerce, therefore, initiated a second antidumping investigation of steel wire nails (Steel Wire Nails II) 46 Fed. Reg. 34615 (July 2, 1981). On February 3, 1982 a preliminary affirmative determination by the Commission and Commerce resulted in suspension of liquidation of all steel wire nails from Korea. 47 Fed. Reg. 5029. A final determination of sales at less than fair value was made on June 24, 1982. 47 Fed. Reg. 27393. In August 1982 the Commission found that the less than fair value imports were causing material injury to domestic industries.

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[1]
1. Murakami Kogyo Co. (renamed Ah Ju Steel Co.);
2. Korea Murata Industrial Co. (renamed Han Duk Steel Co., Ltd.);
3. Kankoku Nittei Co., Ltd. (renamed Je Il Steel Co., Ltd.);
4. Kankoku Nitto Ltd.;
5. Korea Nippon Ceisen Co., Ltd.;
6. Kuk Dong Metal Industrial Co.

Accordingly on August 6, 1982 antidumping duties were imposed on Korean steel wire nails entered or withdrawn from warehouse on or after February 3, 1982. 47 Fed Reg. 35266 (August 13, 1982). The Korean producers under the findings of Steel Wire Nails II did not file an appeal.

In this action the court will first consider plaintiffs' motion for a preliminary injunction. The moving party must establish its entitlement to the preliminary relief sought by demonstrating that the well-known factors for determining whether an injunction should be granted are present. Interim injunctive relief is an extraordinary and drastic remedy which should not be routinely granted unless the movant meets the burden of persuasion. Wright & Miller, Federal Practice and Procedure, Civil § 2948 (1973).

S. J. Stile Associates Ltd. v. *Dennis Snyder,* 68 CCPA 27, C.A.D. 1261, 646 F.2d 522 (1981) set forth the following factors necessary for determining whether a preliminary injunction should be granted:

1. a threat of immediate irreparable harm;
2. that the public interest would be better served by issuing than by denying the injunction;
3. a likelihood of success on the merits; and
4. that the balance of hardship on the parties favors the moving party.

The injury referred to above must be *irreparable.* An injury though substantial in terms of money is not sufficient unless it is irreparable. *Sampson* v. *Murray,* 415 U.S. 61, 90 (1974).

While plaintiffs in this action have alleged irreparable injury, neither affidavits nor supporting authorities were submitted to the court. The allegation "lost sales" as a result of the nonimposition of antidumping duties has not been shown. In fact plaintiffs have failed to establish a nexus between the lost sales and the failure to impose dumping duties. In addition, since the entries involved extend over a three year period, the merchandise has long since entered the trade and commerce of the United States and therefore has no effect on sales of merchandise currently being imported. Importations of Korean nails since "Steel Wire Nails II" require deposits of estimated antidumping duties and liquidation of said entries have been suspended. 47 Fed. Reg. 35266.

Plaintiffs having failed to meet their burden of establishing irreparable injury, the motion for a preliminary injunction is denied. It would serve no useful purpose to consider the other three elements required for a preliminary injunction, set forth in *Stile, supra.*

Plaintiffs' motion for remand to the International Trade Administration to determine whether any of the false, fictitious or fraudulent representations in the administrative record affected its determination must also be denied.

The thrust of plaintiffs' motion is the fraud committed by Mitsui (U.S.A.). The record before me establishes that both Mitsui (U.S.A.) and Pacific Steel and Supply Company, a customer of Mitsui (U.S.A.), pled guilty in criminal actions. Pacific Steel admitted filing false statements which did not reflect the true invoice or purchase price, a violation of 18 U.S.C. 542. Mitsui (U.S.A.) admitted to filing false customs documents, the Special Summary Steel Invoices, in violation of 18 U.S.C. 371. The latter invoices were utilized by customs to determine whether sales were being made below the "trigger price". However, the information utilized to determine less than fair value margins did not involve the price from Mitsui (U.S.A.) to its customers in the United States. The purchase price was calculated on the basis of the price *to* an unrelated trading company or *to* an unrelated purchaser in the United States. 45 Fed. Reg. 3942. The determination by the ITA involved the price *from* the nail manufacturing companies *to* the trading companies. This was the price that was compared to foreign market value which would not be affected by any subsequent fraud on the part of a trading company in dealings with its customers in the United States.

In addition, the ITA's determination makes it clear that the foreign market value is not related to the Japanese trading company's deception since six Korean companies *supra* were found to be selling at less than fair value. The home market price was utilized for the foreign market value in the case of Kuk Dong. The merchandise of the five other companies, subsidiaries of Japanese nail manufacturers, was appraised at foreign market value as per Section 773(d), Tariff Act of 1930 as amended by the Trade Agreements Act of 1979, 19 U.S.C. 1677 b(d).

Since it was the price of the Korean nail manufacturing companies to the trading companies that established less than fair value margin, that margin could not have been affected by the subsequent price from the Japanese trading companies to its customers. Therefore, plaintiffs' motion for remand is denied.

Plaintiffs' motion to set aside the liquidations made since December 14, 1982, covering merchandise entered between May 23, 1980 and February 2, 1982 is denied. Congress in enacting Section 1516A defined, delineated, and restricted the remedies available to the parties in antidumping and countervailing duty actions. Of particular interest in the instant action are the provisions of 1516A(c)(1) and (2). The former controls the liquidation of entries in accordance with the determination of the administering authority. This is so, unless an injunction is granted under the provisions of 1516A(c)(2), and if the merchandise is entered or withdrawn from warehouse for consumption on or before the date of publication in the Federal Register. Plaintiffs, in the present action did not seek an injunction until March 21, 1983.

As indicated *supra* following the investigation in "Steel Wire Nails I", Commerce continued to monitor imports of steel wire nails, and found that such merchandise was being sold at less than the trigger price. Thereafter, a second antidumping investigation was instituted, a preliminary affirmative determination was made, and liquidation of entries of Korean nails were suspended. A final determination of sales at less than fair value covering all but two Korean producers [2] was made on June 24, 1982.

In view of the foregoing the entries made prior to notice of publication of suspension of liquidation of Korean wire nails under "Steel Wire Nails II", were properly the subject of liquidation under provisions of 1516A(c)(1) since plaintiffs failed to obtain an injunction as provided for under 1516A(c)(2). Plaintiffs' motion to set aside the liquidations made since December 14, 1982, covering merchandise entered between May 23, 1980 and February 2, 1982 must be denied.

In view of the holdings made the court is of the opinion this action must be dismissed on the grounds that the action is not one in which relief may be granted. This action is, therefore, dismissed.

GOLDING BROS., DIV. OF W. R. GRACE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before LANDIS, *Judge.*

Court No. 76-12-02775

Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Motion for summary judgment denied; Cross-motion for summary judgment denied.]

(Decided August 22, 1983)

DiFalco Amhurst Smithson Tannenbaum & Duval (*Herbert T. Posner* on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Susan Handler-Menahem* on the motion), for the defendant.

LANDIS, *Judge:* In this classification action plaintiff moves for summary judgment, defendant opposes said motion and cross-moves for summary judgment.

The subject merchandise herein, fabric manufactured by Johnston of Wemyss, known as Quality S. 3392 was produced in and exported from the United Kingdon and entered periodically at the Port of New York during 1971 and 1972. Customs classified the merchandise pursuant to TSUS item 335.60, as woven fabrics, of vegetable fibers (except cotton): . . . containing over 50 percent by weight of yarns which yarns are composed wholly or almost wholly of fibers not exceeding 5 inches in length and contain not less than 50 percent by weight either of manmade fibers or of manmade fibers and cotton.

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[2] Samchok and Jin Heung.

Plaintiff contends that Customs' classification is erroneous, the merchandise being more properly classifiable under TSUS item 335.90, as woven fabrics, of vegetable fibers (except Cotton): Other: . . . weighing over 4 ounces per square yard.

The pertinent statutes are as follows:

General Interpretative Rules

9. Definitions.—For the purposes of the schedules, unless the context otherwise requires—

* * * * * * *

(f) the terms "of", "wholly of", "almost wholly of", "in part of", and "containing", when used between the description of an article and a material (e.g., "furniture of wood", "woven fabrics, wholly of cotton", etc.), have the following meanings:

* * * * * * *

(ii) "wholly of" means that the article is, except for negligible or insignificant quantities of some other material or materials, composed completely of the named materials;

(iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present; and

* * * * * * *

SCHEDULE 3, PART 3, SUBPART B

Classified:

Woven fabrics of vegetable fibers (except cotton):

335.60 Fabrics, other than the foregoing, containing over 50 percent by weight of yarns which yarns are composed wholly or almost wholly of fibers not exceeding 5 inches in length and contain not less than 50 percent by weight either of manmade fibers or of manmade fibers and cotton.

Claimed:

Other

Weighing over 4 ounces per square yard

335.90 Other

The central issues are whether classification under TSUS item 335.60 requires that both the warp and the weft yarn be composed individually, either wholly or almost wholly, of fibers not exceeding five (5) inches in length, and whether each respective yarn must contain not less than fifty (50%) percent by weight of either manmade fibers or manmade fibers and cotton.

Plaintiff basically contends that the essential characteristic of the weft yarn is imparted by linen fibers in excess of five (5) inches in length and that it contains no manmade fibers or manmade fibers and cotton. Moreover, plaintiff submits that based upon the legislative history of Item 335.60, *both yarns* must be composed wholly or almost wholly of fibers not exceeding five (5) inches in length and, further, *both yarns* must contain at least 50% by weight either of manmade fibers or of manmade fibers and cotton. Accordingly, plaintiff concludes that the merchandise in issue is not classifiable under the provisions of TSUS Item 335.60, but instead is properly provided for under TSUS Item 335.90.

In support of its position plaintiff submits three affidavits. The first affidavit is by Mr. Charles Ian Barcley Reekie, the managing director of the firm known as Johnston of Wemyss (Johnston). The affiant states that in the years 1971 and 1972 Johnston sold certain fabric, known as Quality S. 3392, to plaintiff and, that the weft yarn of said fabric was composed of 100% linen fibers. He further states that all the linen yarn used in weaving the fabric sold to plaintiff was purchased from two linen yarn spinners, D. S. Honeyman of Fife, Scotland, and Richards Ltd. of Aberdeen, Scotland.

The next affidavit which plaintiff submits, is by Mr. D. J. L. Innes. According to the affidavit, Mr. Innes is a Director of D. S. Honeyman, Ltd. which is engaged in the business of spinning linen (flax) yarn. Further, the affiant states that during the years 1971 and 1972 D. S. Honeyman, Ltd. sold linen yarn to Johnston of Wemyss for purposes of Johnston's fabric production designated Quality S. 3392. Mr. Innes states that the flax sold to Johnston had a fiber length varying between twenty four (24) inches and forty (40) inches but, that in processing the yarns most were broken in length during carding operations, although at the final spinning process there was "a significant and substantial proportion of fibers varying from five (5) inches to eight (8) inches in length."

The final affidavit plaintiff submits is by Mr. D. A. B. Duke, a former Commerical Director of Richards Ltd., a manufacturer of yarns. He states that in and around 1972 his company supplied G. J. Johnston (Wemyss) Ltd. with linen yarn spun from raw flax material. He states that a characteristic of raw flax yarn spun for Johnston (Wemyss) is its unusually long staple length, normally well in excess of six inches, and is spun on gill spinning frames capable only of processing material which is predominately six inches in staple length or longer.

Additionally, plaintiff submits the results of various laboratory tests performed by the United States Customs Service on the imported merchandise.

In support of its cross-motion for summary judgment defendant also submits the results of Customs Service laboratory tests on the imported merchandise and, additionally, submits an affidavit executed by Amelia Eaton, the Laboratory Director of the U.S. Customs laboratory in New York verifying that the laboratory reports submitted by defendant are accurate copies of the original laboratory reports accurately reflecting the results of the chemical analyses performed by the laboratory.

Defendant also submits an affidavit executed by Arthur Price, Chairman of the Textile Science Department of the Fashion Institute of Technology. Mr. Price states that all woven fabrics are composed of two systems of yarns, a warp and a weft, and that any woven fabric may be composed of approximately a thousand (1,000) or more warp yarns and from ten (10) to possibly one hundred (100) or more weft yarns per inch. He further states that it is generally accepted trade practice in the textile industry, when referring to yarns in a fabric, to mean all of the yarns. Use of the term "yarns" means reference to all of the yarns in a fabric.

Reviewing the motions of both parties including the briefs and documents submitted in support thereof together with the amended pleadings, the court finds that there are material issues of fact present which require resolution upon a full trial on the merits. *Inter-Pacific Corp.* v. *United States,* 1 CIT 338 (1981). The essence of summary judgment is fact finding and not fact determination. *Yamaha International Corp.* v. *United States,* 3 CIT 108 (1982). The court determines whether there exists factual issues to be tried but must refrain from trying issues of fact on a summary judgment motion. *Heyman* v. *Commerce and Industry Insurance Co.,* 524 F. 2d 1317 (2d Cir. 1975). *Farr Man & Co.,* v. *United States,* 4 CIT 55, 544 F. Supp. 908 (1982).

Both parties seek final judgment merely upon the submission of shallow affidavits and certain laboratory reports. The court finds these insufficient to grant either party the right to such a drastic remedy which precludes a party from exercising its right to present evidence to the court on a full trial on the merits. *Donnelly,* v. *Guion,* 467 F. 2d 290 (2d Cir. 1972); *Yamaha International Corp.* v. *United States, supra.*

Plaintiff questions the competency of one of defendant's affiants (Amelia Eaton) to render an opinion that the imported fabric consists of many yarns on the grounds that plaintiff is unaware of any scientific or technical education or training of the affiant which would tend to qualify the affiant as competent to render an opinion as to this matter. Certainly this is a matter that should be brought out on direct testimony and challenged upon cross-examination. Moreover, plaintiff has not had a chance nor will it have on the summary judgment motion to challenge the potentially very damaging statement by Arthur Price, the source of defendant's other affidavit.

Likewise defendant is entitled to inquire as to the testimony of plaintiff's three affiants. Plaintiff asks this court grant it summary judgment based merely upon the statement of the managing director of Johnston of Wemyss (Reekie affidavit) that all the weft yarn containing 100% linen fibres was purchased exclusively from two sources. In support of the Reekie affidavit plaintiff then submits affidavits of an official of each of these suppliers as to the length of the yarn sold to Johnston of Wemyss who created the fabric sold to plaintiff. Nothing is mentioned as to the length of the total yarn content if this is, and it certainly appears it will be, an issue in this case.

Where a party opposing summary judgment raises any triable fact questions, he has the right to adduce testimony of live witnesses and cross-examine the opponent's witnesses rather than to have to rely on the affidavits submitted for and in opposition to the summary judgment motion. *United States* v. *J. B. Williams Co.*, 498 F. 2d 414, 430 (footnote 19), (2d Cir. 1974); *S. S. Kresge Co.* v. *United States*, 77 Cust. Ct. 154, C.R.D. 76-6 (1976); *Schoenfeld & Sons, Inc.* v. *United States*, 3 CIT 123 (1982).

Accordingly, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied in all respects.

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569 F. Supp. 73

AMERICAN SPRING WIRE CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COMPANHIA SIDERURGICA BELGO-MINEIRA, INTERVENOR

Before MALETZ, *Senior Judge*.

Court No. 82-11-01579

Opinion and Order

(Decided August 24, 1983)

Eugene L. Stewart, *Terence P. Stewart* and *Kathleen T. Weaver* for the plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the brief), for the defendant.

Wald, Harkrader & Ross (*Christopher Dunn* and *Arthur J. Lafave III* on the briefs) for intervenor Companhia Siderurgica Belgo-Mineira.

MALETZ, *Senior Judge:* This action contests various aspects of a suspension agreement entered into between the Department of Commerce, International Trade Administration (ITA), and the government of Brazil pursuant to section 704 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671c (Supp. IV 1980). Four months after this action was filed, the U.S. International Trade Commission

(ITC) made a determination that no industry in the United States was either suffering or threatened with material injury as a consequence of the subsidies which were the raison d'etre of the suspension agreement. *See* 48 Fed. Reg. 12,143 (1983). By operation of law the suspension agreement became null and void *ipso facto.*[1] *See* S. Rep. No. 249, 96th Cong., 1st Sess. 54 (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 440 ("If the final determination by the ITC . . . in a continued investigation is negative, then the agreement would be void . . ."). Intervenor Companhia Siderurgica Belgo-Mineira, joined by the government, has now moved for a dismissal of plaintiffs' complaint based on mootness.

For the reasons that follow, the court agrees that this action is moot. Accordingly, the motion to dismiss is granted.

By way of background, on March 4, 1982 plaintiffs American Spring Wire Corp., Florida Wire & Cable Co. and Shinko Wire America, Inc. filed a petition with the ITA, pursuant to 19 U.S.C. § 1671a(b), alleging that subsidies were being provided to manufacturers, producers or exporters of prestressed concrete steel wire strand from Brazil, and that imports of this merchandise were a cause or threat of material injury to a domestic industry in the United States. On August 2, 1982, the ITA issued a preliminary affirmative subsidy determination. 47 Fed. Reg. 34,609. On October 15, 1982, the governments of Brazil and the United States signed a suspension agreement—the subject of this action—under which the countervailing duty investigation was suspended and suspension of liquidation of customs duties was terminated in return for Brazil's agreement to place an export tax on wire strand exported to the United States. It was agreed that the export tax would be equal to the amount of the net subsidy found by the ITA to exist for this product. 47 Fed. Reg. 47,048 (1982). On November 19, 1982, plaintiffs filed this action, contesting the legality of that agreement.

Despite this suspension agreement, plaintiffs elected to press on with their administrative attack. To that end, pursuant to 19 U.S.C. § 1671c(g),[2] they requested a continuation of the countervailing duty investigation. Complying with this request the ITA issued a final affirmative determination on January 26, 1982. 48 Fed. Reg. 4,516. However, on March 23, 1983, the ITC made a final negative injury determination which, as previously indicated, rendered nugatory the suspension agreement. Intervenor thereupon filed its present motion which the government joined.

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[1] 19 U.S.C. § 1671c(f)(3)(A) provides in part:

> If . . . the Commission continue[s] an investigation in which an agreement has been accepted . . ., then—
>
> (A) if the final determination by . . . the Commission . . . is negative, the agreement shall have no force or effect . . . .

[2] That section provides in part:

> If the administering authority [the ITA], within 20 days after the date of publication of the notice of suspension of an investigation, receives a request for the continuation of the investigation from—
>
> * * * * * * *
>
> (2) an interested party . . .,
>
> then the administering authority and the Commission shall continue the investigation.

All of the parties acknowledge the constitutional dimension of the mootness doctrine. *See, e.g., Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964). In order to satisfy the "case of controversy" clause of Article III there must exist "a present, live controversy . . . to avoid advisory opinions on abstract propositions of law." *Tennessee Gas Pipeline Co.* v. *FPC,* 606 F.2d 1373, 1379 (D.C. Cir. 1979) ("no jurisdiction over suits challenging administrative orders which are moot"). In the present case, there is no such controversy since the subject of the action—the suspension agreement—has expired by operation of law. If the court were to render an opinion on the legality of various aspects of the suspension agreement, it would be rendering an opinion that is merely advisory. And it is well-nigh aphoristic that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971). Since the suspension agreement is no longer in effect, such an opinion would have no impact on the current interests of the parties to this litigation. In this sense, the controversy is not one "admitting of specific relief through a decree of a conclusive character, . . ." *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227, 241 (1937).

It is true that in another action pending in this court, *see American Spring Wire Corp.* v. *United States,* Court No. 83-3-00455, plaintiffs have challenged the ITC's no-injury determination—the event which terminated the suspension agreement. However, no disposition of that determination by this court could possibly breathe new life into the suspension agreement. The ITC's no-injury finding sounded the death knell of that agreement; this court lacks power to resurrect it under the circumstances presented here. Plaintiffs' contention that the suspension agreement would be revived should they successfully challenge the ITC's negative injury determination is pure surmise. Straying into a prediction of future events is no substitute for showing an actual controversy, or even one that is likely to recur. "[S]uch speculative contingencies afford no basis for our passing on the substantive issues [plaintiffs] would have [the court] decide." *Hall* v. *Beals,* 396 U.S. 45, 49 (1969).

Plaintiffs argue that this action fits into that narrow exception carved out of the mootness doctrine—an action "capable of repetition, yet evading review." *See, e.g., Roe* v. *Wade,* 410 U.S. 113 (1972); *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911). Plaintiffs apparently contend that the nature of suspension agreements is such that their formal legal effect will be typically shortlived. The court finds this argument meritless. Suspension agreements, as clearly contemplated under the Trade Agreements Act of 1979, will generally be of long duration, unless pretermitted by a continued investigation in which either no subsidy or no injury is found to exist. *See, e.g.,* 19 U.S.C. § 1671c(d)(1), which calls for effective monitoring of suspension agreements by the United

States, and 19 U.S.C. § 1675, providing for administrative review of such agreements no sooner than two years after they are first published. An interested party who wishes to challenge such an agreement will thus rarely find itself faced with a situation where the agreement has evaded judicial review. If the procedures of the ITA at issue here remain unchanted, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this court.

In sum, the controversy among the parties has clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." *Haworth,* 300 U.S. at 240–41. This case, therefore, in no way presents "the *exceptional* situation . . . which might permit a departure from '[t]he usual rule in federal cases . . . that an actual controversy must exist [at the judicial review stage], and not simply at the date the action is initiated.'" *DeFunis* v. *Odegaard,* 416 U.S. 312, 319 (1974), *quoting Roe* v. *Wade,* 410 U.S. at 125 (emphasis added).

Because the suspension agreement is null and void, the court concludes that it cannot, consistently with the limitations of Article III, consider the issues tendered by plaintiffs. Accordingly, the motion to dismiss plaintiffs' complaint is granted and the action is dismissed.

NATIONAL PRESTO INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 77-12-04907

Before FORD, *Judge.*

Food Lifters

Certain articles composed of base metal and used with a deep fryer to place food in the fat or remove it were classified as spoons under the provisions of 650.56, Tariff Schedules of the United States, *held* entitled to entry free of duty under the provisions of item A651.47, TSUS, by virtue of the Generalized System of Preferences.

The term spoon was the subject of litigation in *Aluminum Housewares Co., Inc.* v. *United States,* 81 Cust. Ct. 24, C.D. 4760 (1978) and therefore the common meaning of the term has been determined. The involved merchandise does not meet the specifications of the definition adopted by the court.

[Judgment for plaintiff.]

(Decided September 2, 1983)

Stein, Shostak, Shostak & O'Hara (Joseph P. Cox at the trial and on the brief and *S. Richard Shostak* on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Susan Handler-Menahem* at the trial and on the brief), for the defendant.

FORD, *Judge:* The merchandise covered by this action, described on the invoices as "Steel Food Lifters", was classified by Customs as spoons under the provisions of Item 650.56 TSUS and accordingly assessed with duty at 17 percent ad valorem. Plaintiff contends and defendant agrees that, if the Court finds the imported articles are not spoons, said merchandise is entitled to entry free of duty under item A651.47 TSUS by virtue of the Generalized System of Preferences, Pub. L. 93-618 and Executive Order 11888 (November 25, 1975) as claimed. Defendant has conceded that plaintiff has met all requirements for GSP treatment.

In view of the foregoing and plaintiff's withdrawal of its alternative claim under the provisions of Item A648.51 TSUS, said claim is dismissed. By virtue of the stipulation referred to above and the pleadings the sole issue presented for determination by the Court is whether the imported articles are spoons.

The pertinent statutory provisions involved read as follows:

Forks, spoons, and ladles, all the foregoing which are kitchen or table ware, with or without their handles:

* * * * * * *

650.56	Spoons and ladles: With base metal (except stainless steel) or nonmetal handles	17% ad val.

Hand tools (including table, kitchen, and household implements of the character of hand tools) not specially provided for, and metal parts thereof:

* * * * * * *

A651.47	Other * * *. Table, kitchen, and household implements	* * *

This action was submitted to the court on a record consisting of the testimony of four witnesses called on behalf of plaintiff and one called by defendant. In addition, there were received on behalf of plaintiff six exhibits. Defendant offered and there were received in evidence five exhibits. The official papers were received in evidence without being marked.

Plaintiff called as its first witness Mr. Ron Oakland, a senior vice president and creative director of the advertising agency handling plaintiff's products. Mr. Oakland testified he has been active in the food industry for thirty-five years and was fully familiar with the marketing of food and kitchen utensils, including the imported merchandise for the past eight years. Exhibit 1 was identified by the witness as representative of the imported merchandise. Exhibit 2, a catalog sheet, was prepared under the witness' direction in early 1976 and refers to the imported article as a scoop. The witness testified that when the involved article was first introduced there had been other catalog or instructional booklets which referred to the item as a spoon. However, since Mr. Oakland felt the term spoon was not descriptive of the imported article, the term was discontinued without knowledge of, and prior to, any controversy which later arose with the Customs Service. Since early 1976 the imported article has been described as a scoop.

The witness identified Exhibits 3A through 3G as sales promotional material, all of which had been prepared under his direction during 1976 and early 1977. These articles were prepared for the purpose of showing the benefits and reasons for the design of the scoop.

The definition of the term spoon from *Webster's Third New International Dictionary of the English Language* (1963), page 2205, *infra,* cited in *Aluminum Housewares Co. Inc.* v. *United States,* 81 Cust. Ct. 24, C.D. 4760 (1978), was read to Mr. Oakland, who agreed that it applied to slotted spoons, but not to the merchandise involved herein. The witness identified plaintiff's Exhibit 4, the Ekco Kitchamajig, which is basically the same as plaintiff's Exhibit 1, and which he would consider to be a gadget or hand tool in the trade, but certainly not a spoon.

Ms. Carol Peterson was then called on behalf of plaintiff. The witness is a graduate of Oregon State University, with a Bachelor of Science degree in food and nutrition, and has been a food writer for *Sunset Magazine.* The witness has also been a food consultant for over eighteen years, as well as serving as a food writer and food stylist. Ms. Peterson had also taken cooking courses under James Beard, the well known authority on cookery and the author of a number of cookbooks.

Ms. Peterson testified she was familiar with the use of plaintiff's Exhibit 1 and its deep fryers. Exhibit 1 is used to lower food into fat to be deep fried. It is also used to turn and to remove the cooked items from the hot fat. According to the witness, the handle must be long enough so the user does not get splattered by the hot fat. Exhibit 1 is a hybrid utensil which she called a food lifter or skimmer. According to the witness, Exhibit 1 is not a slotted spoon, since it does not have a round or oval bowl, which is characteristic of a spoon. If Exhibit 1 had an oval shape it might be considered a spoon, except she had never seen a looped handle on a spoon. Ms. Peterson did not see any substantial difference between Exhibits 1 and 4. In her opinion, Exhibit 4 was not a spoon since it does not meet the qualifications of the definition of a spoon. She testified that there are spoons utilized for special purposes, such as grapefruit spoons, measuring spoons, sugar spoons, etc. The witness was of the opinion that Exhibit 1 resembled a skimmer, although skimmers generally do not have slots but have holes or are made of mesh. A skimmer is used to remove cooked articles from hot fat or smaller pieces that have broken off and floated to the surface.

While Ms. Peterson was not familiar with defendant's Exhibit C, a nylon slotted spoon, she indicated that it could not be used in hot fat since it would melt, whereas Exhibits 1 and 4 could be so used. The witness further testified that if Exhibit C were made of metal it could not be used in the same manner as Exhibit 1 since it would be unsafe due to the fact that the bowl was so narrow that one would run the risk of having articles fall off and burn the user with the hot oil.

Mr. Sandy Rosenholz, a manufacturer's representative for Pet Accessories and Supplies, was called on behalf of plaintiff. He identified plaintiff's Exhibits 5 and 6 as a plastic cat litter scoop, similar to a metal litter scoop which his company manufactures. He testified that in the pet industry Exhibits 5 and 6 were called cat litter scoops or just scoops. The witness agreed with the *Webster's* Dictionary definition contained in *Aluminum Housewares Co. Inc.*, infra.

The final witness called on behalf of plaintiff was Ms. Judythe Daria Roberts, who testified that she had run a gourmet school of cooking and entertaining for ten years. In addition the witness has also given cooking demonstrations and led cooking tour groups to France, Italy and China. An article about her had been featured in *Bon Appetit* Magazine.

Ms. Roberts was familiar with Exhibit 1, having used such an item and instructed her students in the use of said item to lift fried foods from a deep fat fryer. In her opinion Exhibit 1 is a strainer or scoop. Articles such as Exhibit 4 are strainers or all-purpose tools, but not a spoon. A strainer takes solid particles of food out of liquid and allows the water or fat to drain from the food. The witness agreed with the definition contained in *Aluminum Housewares, infra,* and was of the opinion that Exhibit 1 did not meet the definition. According to the witness a spoon could not be used with a fryer because a spoon has a bowl and would lift out hot fat with the food. In addition, according to the witness, spoons do not have looped handles such as Exhibit 1, which generally keep the handle from getting overly hot as it would with a solid handle. Exhibit 1 would not be considered a slotted spoon since a slotted spoon has a bowl with small holes and a solid handle, all of which make it inappropriate for deep fat frying.

On cross-examination Ms. Roberts was read the definition from *Funk & Wagnall's New Standard Dictionary,* also cited in *Aluminum Housewares, infra.* The witness testified that Exhibit 1 does not have a deep bowl and that scoops generally do not have slots. In addition, Ms. Roberts stated that if Exhibit 1 had a wood or plastic handle it would be extremely dangerous to use in deep fat since the wood would tend to burn and the plastic would tend to melt.

The sole witness called by defendant was Mr. Michael Pettite, a chief instructor and head of the Food Services Program at Pasadena City College since 1975. The definition from *Webster's Third New International Dictionary,* cited in *Aluminum Housewares, infra,* was read to the witness, and he agreed with the definition. He was familiar with the term slotted spoon, having observed them for sale in various stores and having used them at the college and at home. Slotted spoons, such as Exhibits C, D and E have shallow round or oval bowls with slots and can be used to lift food out of stocks or fryers or to mix, blend or prepare food. The witness in his opinion believed Exhibit 1 to be a slotted spoon. According to the witness a plastic handle would not melt as it would not be sitting in the liquid or fat for a long period of time. The witness indicated a plastic handle is not as likely to conduct heat.

Ms. Peterson was recalled and testified that Exhibit C would be inadequate to use in hot oil for several reasons. A utensil composed in part of nylon would melt in hot fat. The witness further testified that if left to lean against the side of the pan the handle would burn. In addition since the bowl is so small it would be dangerous to use in deep frying. She then pointed out that the metal looped handle of Exhibit 1 would not conduct heat as would the solid metal handle of Exhibit C.

Based upon the record as made and the pleadings filed herein, there is no dispute that the imported article is a hand tool which is chiefly used in the household or kitchen and is composed of a base metal. It is elementary in the field of Customs Jurisprudence that tariff terms are to be construed in accordance with their common meaning and commerical meaning which are presumed to be the same. *Ozen Sound Devices* v. *The United States,* 67 CCPA 67, C.A.D. 1246, 620 F.2d 880 (1980); *S.G.B. Steel Scaffolding and Shoring Co., Inc.* v. *United States,* 82 Cust. Ct. 197, C.D. 4802 (1979); *Continental Manufacturing Co., et al.* v. *United States,* 82 Cust. Ct. 187 C.D. 4800 (1979).

Neither party has attempted to establish a commercial designation which differs from the ordinary understanding of the term. Hence, the common meaning of the tariff term would apply. The common meaning of a tariff term is not a question of fact but one of law to be determined by the court, which may consult dictionaries, lexicons, etc. as an aid to its knowledge. See *Sturm, Customs Law and Administration,* § 52.6 (1983) edition). The testimony of witnesses as to the common meaning may be considered, but is merely advisory. *United States* v. *National Carloading Corp., et al.,* 36 CCPA 1, C.A.D. 388 (1948).

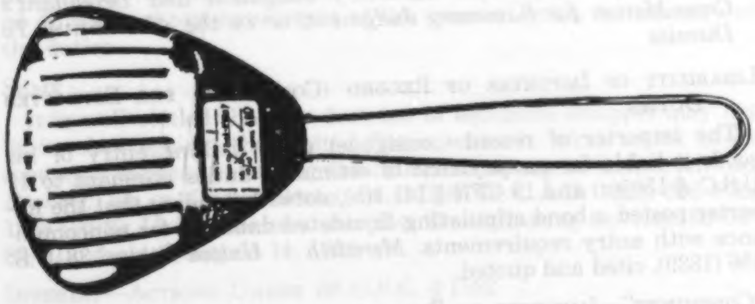
The term spoon was the subject of litigation in *Aluminum Housewares Co. Inc.* v. *United States,* 81 Cust. Ct. 24, C.D. 4760 (1978). The merchandise involved therein was measuring spoons, which the court held to fall within the meaning of the term spoons in 650.56, and in which the court cited the following definitions:

> *Webster's Third New International Dictionary of the English Language,* p. 2205 (1966) defines a "spoon" as:
>
> > [A] usu. metal, plastic, or wooden eating or cooking implement consisting of a small oval or round shallow bowl with a handle—often used in combination [e.g., teaspoon]
>
> and *Funk & Wagnalls New Standard Dictionay of the English Language,* p. 2349 (1956) defines the term "spoon" as:
>
> > A utensil having a shallow ovoid bowl and a handle, used in preparing, serving, or eating food.
>
> As employed in item 650.56 the term "spoons" is qualified, among other things, by the phrase "which are kitchen or tableware". *Webster's Third New International Dictionary of the English Language,* p. 1247 (1966) defines "kitchenware" as "hardware (as cutlery and cooking utensils) for kitchen use."

The Court further observed the term is palpably broad and stated:

> The common meaning of the term "spoon" is palpably broad, encompassing many articles whose identification as such is invariably qualified by reference to some specific function performed. Thus, a teaspoon is so named because it is used to stir sugar in tea. The same can be said with respect to *slotted* spoons, *mixing* spoons, *stirring* spoons, *mustard* spoons, *tablespoons, dessert* spoons, *grapefruit* spoons, *fruit* spoons, *sugar* spoons, *relish* spoons, *soup* spoons, *serving* spoons, *salad* spoons. And by the same token *measuring* spoons are so named because of their specific function of apportioning exact quantities. In fact, a mere reference to the term "spoon" without a prefix denoting function is meaningless in terms of identifying any particular kind of spoon. Obviously, therefore, variation in function between spoons cannot be the basis for denominating one article a spoon and another not a spoon, as plaintiff seems inclined to do. [P. 28.]

In view of the fact that the court has already determined the common meaning of the term spoon, the question presented herein is whether the imported article falls within the term. It is obvious that in *Aluminum Housewares* the measuring spoons fall within the defintion. As I discern the common meaning of a spoon, it must be a utensil or implement (1) with a small or shallow bowl, (2) which is ovoid or round, (3) has a handle, and (4) is used for eating, cooking or preparing food. While the imported article may be utilized in preparing food or as a cooking implement, it is not used for eating. The court is of the opinion that the imported article does not meet the specifications of the definition heretofore adopted by the court and agreed to by all the witnesses in the instant case. The so-called lifter involved herein is not oval or round in shape but has a triangular shape approximately 4 inches wide as indicated below.



Defendant's attempt to relegate the involved item to a slotted spoon category, as indicated by defendant's exhibits C, D, and E, is to no avail. The above exhibits meet the specifications of having shallow round or oval bowls and are used for eating, preparing food, or cooking, whereas the involved merchandise conforms only in part to the specifications set forth.

In the field of Customs Jurisprudence it has often been stated that a sample is a potent witness. *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958). Based upon ocular inspection of Exhibit 1 together with the record the court is satisfied that the imported merchandise is not a spoon as set forth in *Aluminum Housewares, supra.*

In conjunction with the fact that the court is of the opinion that the imported merchandise is not a spoon, defendant's answer to the first amended complaint admits the articles involved have base metal handles, are hand tools, are household and kitchen utensils. In addition the further admission that plaintiff has met all statutory requirements for GSP treatment, establishes plaintiff's claim (see Answer, paragraphs 6 to 8 and 11 to 15).

In view of the foregoing the claim of plaintiff for entry free of duty under Item A651.47, TSUS, is sustained. All other claims are overruled.

Judgment will be entered accordingly.

572 F. Supp. 1284

UNITED STATES, PLAINTIFF *v.* HAROLD GOODMAN, DEFENDANT

Court No. 81-9-01150

Before BERNARD NEWMAN, *Judge.*

On Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, or in the Alternative, To Dismiss

LIBABILITY OF IMPORTER OF RECORD (CONSIGNEE) FOR ESTIMATED DUTIES

The importer of record (consignee) upon making entry of his goods is liable for nonpayment of estimated duties pursuant to 19 U.S.C. § 1505(a) and 19 CFR § 141.1(b), notwithstanding that the importer posted a bond stipulating liquidated damages for noncompliance with entry requirements. *Meredith* v. *United States,* 38 U.S. 486 (1839), cited and quoted.

"CONSIGNEE"—IMPORTER OF RECORD

The importer of record is a "consignee" for purposes of duty liability under 19 U.S.C. § 1505(a). *A.N. Deringer, Inc.* v. *Consolidated Computer Services International, Inc.,* 381 F. Supp. 1208 (D. Mass. 1974).

LIABILITY OF IMPORTER OF RECORD FOR ESTIMATED DUTIES—UNLIQUIDATED ENTRIES

Action brought by the United States to recover unpaid estimated duties owing by defendant pursuant to 19 U.S.C. § 1505(a) is not premature on the basis that entries were unliquidated. Section 1505(a) explicitly requires the deposit of estimated duties "at the time of making entry," and therefore liquidation (the final ascertainment and computation of the importer's duty liability) is not a condition precedent to the importer's liability for estimated duties which accrue upon importation.

ACTION BY UNITED STATES AGAINST IMPORTER FOR RECOVERY OF ESTIMATED DUTIES—DOCTRINE OF ELECTION OF REMEDIES INAPPLICABLE

In action brought by the United States to recover unpaid estimated duties owing by defendant under 19 U.S.C. § 1505(a), the fact that the importer posted a bond stipulating liquidated damages and that there was an administrative demand for liquidated damages did not constitute a binding election of remedies barring the present action for recovery of estimated duties in the absence of a showing that the demand for liquidated damages was satisfied by the importer. The mere demand by Customs for payment of liquidated damages, without more, cannot constitute a binding election. 25 Am. Jur. 2d 646 (1966).

SAME—EQUITABLE ESTOPPEL

Importer's defense of equitable estoppel, predicated upon importer's alleged detrimental reliance upon administrative demand for liquidated damages, cannot be sustained on the basis of: acceptance by the Government of importer's Immediate Delivery and Consumption Entry Bond under 19 CFR § 172.1(a); the Government's demand thereon for liquidated damages for nonpayment of estimated duties; and commencement of the present action for recovery of the duties.

SAME

It is well settled that the doctrine of equitable estoppel may not be invoked against the United States when it takes action in its sovereign capacity involving the collection of import duties. *Air-Sea Brokers, Inc.* v. *United States,* 66 CCPA 64, C.A.D. 1222, 596 F.2d 1008 (1979); *United States* v. *Bar Bea Truck Leasing Co.* Nos. 82-36/83-515, decided August 11, 1983.

INTEREST—ACTIONS UNDER 28 U.S.C. § 1582

There is no statutory authorization for an award of interest to the Government in actions brought under 28 U.S.C. § 1582. Nevertheless, even in the absence of statutory authority, interest may be recovered on money due the United States. *Billings* v. *United States,* 232 U.S. 261 (1914).

PREJUDGMENT INTEREST

In the absence of a statutory provision to the contrary, an award of prejudgment interest is a matter left to the sound discretion of the trial court, is governed by considerations of equity and fairness, and is awarded to make the wronged party whole. *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 676 F.2d 1291, 1310 (9th Cir. 1981), *cert. denied 103 Supreme Court 364 (November 8, 1982); United States* v. *California State Board of Equalization,* 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd* 456 U.S. 901 (1982); *Payne* v. *Panama Canal Co.,* 607 F.2d 155, 166 (5th Cir. 1979).

SAME—ACTION BY UNITED STATES TO RECOVER UNPAID ESTIMATED DUTIES

In action brought by the United States to recover unpaid estimated duties owing by defendant under 19 U.S.C. § 1505(a), the Government may be equitably entitled to an award of prejudgment interest to compensate it for loss of use of the money due. In the absence of any statutory provision to the contrary, prejudgment interest will be calculated in this case on the basis of the amounts of estimated duties owing the United States from the due dates for payment thereof—ten working days after entry (19 CFR §§ 141.101(a) and 142.12(b)).

Same

In action brought by the United States to recover unpaid estimated duties owing by defendant pursuant to 19 U.S.C. § 1505(a), it is equitable that prejudgment interest be calculated on the basis of the *rate* provided for in 28 U.S.C. § 2644 (in accordance with 26 U.S.C. § 6621), since that is the rate which Congress determined would adequately compensate an importer for the loss of use of its money when duties are erroneously assessed.

Postjudgment Interest

In action brought by the United States to recover unpaid estimated duties owing by defendant under 19 U.S.C. § 1505(a), postjudgment interest is to be calculated at the rate specified in 28 U.S.C. § 2644 (in accordance with 26 U.S.C. § 6621) on the basis of the same equitable considerations applicable to the calculation of prejudgment interest under 28 U.S.C. § 2644.

Same—Actions Under 28 U.S.C. § 1582(3)

While it is true that 28 U.S.C. § 2644 does not embrace actions under 28 U.S.C. § 1582, the rate of interest specified in section 2644 (in accordance with 26 U.S.C. § 6621) may be used in calculating postjudgment interest in actions brought by the United States under section 1582(3).

Same—28 U.S.C. § 1961

Since the decision in *United States* v. *Servitex, Inc.*, 3 CIT 67 (1982), involving an action by the United States under 28 U.S.C. § 1582, the statutory provision involved in that case pertaining to the calculation of interest, 28 U.S.C. § 1961, has been amended so as to change the method of calculating the rate of postjudgment interest, and now stipulates that it "shall not be construed to affect the interest on any judgment of any court not specified in this section". The Court of International Trade is not one of the courts specified in section 1961.

Costs

Although Rule 54 of the Court of International Trade, unlike corresponding Rule 54 of the Federal Rules of Civil Procedure, does not provide for costs, nonetheless the Court has the discretion to award costs in accordance with its statutory authority under 28 U.S.C. §§ 1920 and 2412. Where, as in the present case, the importer played "fast and loose" with the issuance of checks for the payment of estimated duties, which checks were unpaid by the bank for insufficiency of funds, equity and the unique facts and circumstances of the case justify an award of costs to the Government.

[Plaintiff's motion granted with interest and costs; defendant's cross-motion denied.]

(Dated September 13, 1983)

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Susan Handler-Menahem, Esq.* on the brief) for the plaintiff.

Richard A. Kulics, Esq., on the brief, for the defendant.

BERNARD NEWMAN, *Judge*:

Introduction

The Government has instituted this action pursuant to 28 U.S.C. § 1582(3) to recover $117,231.46 for estimated customs duties (plus interest and costs) claimed to be due under 19 U.S.C. § 1505(a) on six entries by defendant at the port of San Francisco, California, between December 1980 and March 1981.

Presently before the Court are plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, or in the alternative, to dismiss.

The Facts

The facts in this case are not in dispute.

The six entries in question were made by defendant, Harold Goodman, as the importer of record, and the importations were released by Customs to defendant on immediate delivery applications. Duties were estimated on the entries by the San Francisco District Director as follows:

Entry No.	Estimated Duties	Due Date
81-300448-4	$21,895.26	Jan. 9, 1981.
81-300453-6	26,589.76	Jan. 13, 1981.
81-300505-6	19,866.90	Jan. 26, 1981.
81-300506-9	20,814.67	Jan. 26, 1981.
81-300554-8	20,356.68	Feb. 2, 1981.
81-300795-7	13,928.19	Mar. 20, 1981.

While the estimated duties total $123,451.46, Customs has, except for checks returned unpaid by the bank, received only $6,220.00, leaving an unpaid balance of $117,231.46. Although the record is not clear, obviously defendant is playing "fast and loose" relative to the payment of duties. Significantly, according to plaintiff's memorandum in support of its motion for summary judgment (at 4), "the Customs Service received two checks in payment of estimated duties for * * * [two] entries [but these] checks were returned from the bank for insufficient funds. A replacement check in the amount of $40,461.57 was received by the Customs Service. * * * The check for $40,461.57 was [also] returned unpaid by the bank * * *."

These facts are not disputed by defendant.

Parties' Contentions

The Government contends that pursuant to 19 U.S.C. § 1505(a) Harold Goodman, as the importer of record, is liable for payment of estimated duties (plus interest as costs) on the goods that he entered, notwithstanding that the importer posted a bond stipulating liquidated damages.

Defendant admits that there is an unpaid balance of $117,231.46 in estimated duties, but raises several affirmative defenses: (1) the action is premature since the entries are unliquidated; (2) this suit is barred by the doctrine of election of remedies since plaintiff has demanded liquidated damages under defendant's bond; (3) the Government is estopped to bring this action by the fact that defendant submitted a bond stipulating liquidated damages and the Government has made a demand for liquidated damages; consequently, the Government's sole remedy is a suit for liquidated damages under the bond.[1]

Opinion

I find that defendant's affirmative defenses are wholly without merit, and inasmuch as there is no genuine justiciable issue of fact for trial, the Government is entitled to summary judgment.

1

The Government's claim in this action is predicated upon a statutory obligation of defendant, as the importer of record and consignee of the goods, to deposit estimated duties at the time of making entry. This obligation is set forth in 19 U.S.C. § 1505(a):

> § 1505. Payment of Duties
>
> (a) *Deposit of estimated duties.* Unless merchandise is entered for warehouse or transportation, or under bond, the consignee shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon.

Additionally, the Customs Regulations, 19 CFR § 141.1(b), state:

> (b) *Personal debt of importer.* The liability for duties, both regular and additional, attaching on importation constitutes a personal debt due from the importer to the United States

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[1] Defendant's additional defense interposed in its answer of accord and satisfaction has been abandoned. Defendant's brief, at 7.

> which can be discharged only by payment in full of all duties legally accruing, unless relieved by law or regulation.* * *

As long ago as the time-honored holding in *Meredith* v. *United States,* 38 U.S. 486 (1839), Mr. Justice Story, writing for the United States Supreme Court, stated (at 493):

> It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer.

Equally clear is that defendant, as the importer of record,[2] is the "consignee" for purposes of duty liability under section 1505(a). *See A. N. Deringer, Inc.* v. *Consolidated Computer Services International, Inc.,* 381 F. Supp. 1208 (D. Mass. 1974), and cases cited therein.

2

Notwithstanding the above-cited authorities, defendant seeks to be relieved of his liability on several grounds, which we now consider.

A

First, defendent asserts that this action is premature since the entries involved are unliquidated, and consequently, the Government is attempting to recover an amount which is not yet a "sum certain." (Defendant's brief, at 2.)

Defendant's position ignores the explicit mandate of section 1505(a) which requires the deposit of estimated duties "at the time of making entry."[3] Further, 19 CFR § 141.1(b), quoted *supra,* refers to the liability for duties as "attaching on importation." Even more to the point is 19 CFR § 141.1(a), which provides:

> (a) *Time duties accrue.* Duties and the liability for their payment accrue upon imported merchandise on arrival of the importing vessel within a Customs port with the intent then and there to unlade, or at the time of arrival within the Customs territory of the United States if the merchandise arrives otherwise than by vessel, unless otherwise specially provided for by law.

In light of the pertinent statute and regulations, it is readily apparent that liquidation (the final ascertainment and computation of the importer's duty liability) is not a condition precedent to defendant's liability for *estimated* duties, which accrue upon importation.

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[2] Defendant admits in his answer to the complaint that he is the importer of record (Answer, Par. 5), and copies of the relevant consumption entries reveal that the merchandise was entered by Harold Goodman for his own account.

[3] A "grace period" of ten days after entry is provided by regulation for the deposit of estimated duties. See 19 CFR § 142.12(b).

B

Defendant next argues that the doctrine of election of remedies bars the instant action. Briefly, the doctrine of election of remedies serves to prevent double redress for a single wrong by precluding suitors from pursuing contradictory or inconsistent remedies on the same state of facts. See 25 Am. Jur. 2d 646 (1966).

Defendant contends that the remedies available to the Government, viz, liquidated damages under defendant's bond or the recovery of estimated duties by virtue of defendant's statutory liability under section 1505(a), are inconsistent; therefore, urges defendant, the Government by its administrative demand for liquidated damages for breach of the bond has made an election of the former remedy which bars pursuit of the latter.

Defendant has not demonstrated that a binding election has been made by the Government. While Customs concededly issued a notice of liquidated damages for breach of the Immediate Delivery and Consumption Entry (term) Bond in conformance with 19 CFR § 172.1(a), there is no showing that such demand was satisfied by defendant. Defendant's allegation concerning an administrative demand for liquidated damages is plainly insufficient to establish a binding election by the Government. As stated by the District Court in *Twentieth Century-Fox Film Corp.* v. *National Publisher's Inc.*, 294 F. Supp. 10, 12 (S.D.N.Y. 1968): "A binding election occurs only where one party pursues a remedy to a point where, in reliance upon such action, the other changes his position to his detriment." The mere demand by Customs for payment of liquidated damages, without more, cannot constitute a binding election. See 25 AM. Jur. 2d 646 (1966) and cases cited. In essence, defendant's allegations demonstrate merely that a remedy other than the one pursued here was available to the Government. No showing whatsoever has been made that a remedy other than the one sought in this action has been pursued by the Government to the point where defendant had reasonably relied thereon to his detriment. Accordingly, the principle of election of remedies is inapplicable here.

C

Finally, we reach defendant's affirmative defense of equitable estoppel.

While not clearly articulated in either defendant's answer or brief, it would appear that defendant's argument is that the Government is estopped to hold him liable for estimated duties since allegedly no entries were filed inasmuch as estimated duties were never deposited. Defendant, therefore, reasons that plaintiff's only remedy is on the bond. In this connection, defendant urges that by accepting a bond, plaintiff represented to defendant that a demand for liquidated damages under the bond would be plaintiff's only remedy for failure to enter the goods properly and pay estimated duties; that defendant relied to his detriment upon plaintiff's demand for liquidated damages under the bond; and that such detriment arises "by virtue of the instant case and demand for judgment" (Defendant's brief, at 7). In substance, apparently defendant is claiming that the Government falsely represented to defendant that a bond would relieve defendant of liability for estimated duties, and hence "the government must be estopped from claiming both liquidated damages and damages in the instant case. Having already elected liquidated damages, they [sic] [plaintiff] are estopped herein." (Defendant's brief, at 7).

Defendant's arguments in support of his estoppel defense are without merit.

The assertion that the Government has mislead defendant to his detriment by making a demand on his bond and thus cannot seek to recover estimated duties in this action is patently frivolous. Defendant's estoppel theory is essentially a reargument of his contention respecting election of remedies, which was rejected, *supra*. Defendant has entered his merchandise and assumed a personal obligation for the payment of estimated duties. For breach of the contractual obligation under defendant's bond to pay Customs duties, the Government may sue for liquidated damages under the bond or may sue defendant to recover the duties owing. *Cf. Art Craft Jewelry Co.* v. *United States,* 64 Cust. Ct. 414, C.D. 4010 (1970).[4]

Plaintiff's administrative demand for liquidated damages under defendant's bond does not estop plaintiff from filing the instant action to recover estimated duties from defendant. It is well settled that the doctrine of equitable estoppel may not be invoked against the United States when it takes action in its sovereign capacity involving the collection of import duties. *Air-Sea Brokers, Inc.* v. *United States,* 66 CCPA 64, C.A.D. 1222, 596 F.2d 1008 (1979). And see the recent opinion of Chief Judge Markey of the Court of Appeals for the Federal Circuit in *United States* v. *Bar Bea Truck Leasing Co.,* Nos. 82-36/83-515, decided August 11, 1983.

As mentioned *supra,* the Government sues to recover unpaid estimated duties with interest. The remaining question we must decide is whether the United States is entitled to an award of interest in an action for unpaid Customs duties under 19 U.S.C. § 1582(3), and if so, the effective date and rate thereof.

At the outset, we recognize that there is no statutory authorization for an award of interest to the Government in actions brought under section 1582. However, pertinent to the question of awarding interest in the present case is the teaching of the Supreme Court in *Billings* v. *United States,* 232 U.S. 261 (1914), that even in the absence of statutory authority, interest may be recovered on money due the United States. This is a long-established rule in the Federal Courts. *United States* v. *Abrams,* 197 F.2d 803, 805 (6th Cir. 1952), *cert. denied,* 344 U.S. 855 (1952).

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[4] According to the Government's brief, the bond coverage in this case is only $85,000.00 and the amount of the unpaid estimated duties is in excess of $117,000.00. Hence, plaintiff points up that "the importer in this case would receive a clear windfall of more than $30,000.00 if the Government's exclusive remedy were against the surety on the bond. The amount of the windfall would, of course, increase if upon liquidation, additional duties are found to be owed" (plaintiff's brief in opposition to defendant's cross-motion, at 5).

First, we consider plaintiff's prayer for prejudgment interest from the date that estimated duties were due, viz., ten working days after entry. See 19 CFR §§ 141.101(a) and 142.12(b). In the absence of a statutory provision to the contrary, an award of prejudgment interest is a matter left to the sound discretion of the trial court, is governed by considerations of equity and fairness, and is awarded to make the wronged party whole. *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 676 F.2d 1291, 1310 (9th Cir. 1981), *cert. denied* 103 Supreme Court 364 (November 8, 1982); *United States* v. *California State Board of Equalization,* 650 F.2d 1127, 1132 (9th Cir. 1981) *aff'd.,* 456 U.S. 901 (1982); *Payne* v. *Panama Canal Co.,* 607 F.2d 155, 166 (5th Cir. 1979). In the present case, it is obvious that if prejudgment interest were not awarded to the Government, nonpayment of estimated duties would amount to an interest-free loan of the money owing the Government from the due dates for payment until recovery. Plainly, then, as a matter of equity and fairness, the United States should be compensated for the loss of use of the money due. Accordingly, in the absence of any statutory provision to the contrary, prejudgment interest shall be paid by defendant to plaintiff calculated on the basis of the amounts of estimated duties and the due dates set forth *supra.*[5] Further, it appears equitable that prejudgment interest should be calculated on the basis of the *rate* provided in 28 U.S.C. § 2644 (in accordance with 26 U.S.C. § 6621), since that is the rate which Congress determined would adequately compensate an importer for the loss of use of its money where duties are erroneously assessed.

Turning to postjudgment interest, the *rate* specified in 28 U.S.C. § 2644 is equitable in an action under 28 U.S.C. § 1582(3) for the same reasons discussed above in connection with prejudgment interest. I have noted, however, that plaintiff has requested that postjudgment interest be calculated in accordance with 28 U.S.C. § 1961, citing *United States* v. *Servitex, Inc.,* 3 CIT 67, (1982), involving an action by the United States under 28 U.S.C. § 1582. However, I see no reason in this present case for utilizing different methods of calculating prejudgment and postjudgment interest. While it is true that section 2644 does not embrace actions under 28 U.S.C. § 1582, the *rate of interest* specified in section 2644 may be utilized in calculating postjudgment interest in actions brought by the United States under section 1582(3). It should also be pointed out that since *Servitex* was decided, 28 U.S.C. § 1961 has been amended so as to change the method of calculating the rate of postjudgment interest; and significantly, the amended statute now stipulates that it "shall not be construed to affect the interest on any judgment of any court not specified in this section". The Court of International Trade is not one of the courts specified in section 1961.

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[5] The amounts of estimated duties and the due dates are not in dispute. The Government admits that it has received partial payment in the sum of $6,220.00 for estimated duties in certain entries. Thus, although the estimated duties in entry No. 81-300448-4 were $21,895.26, defendant's payment of $6,000.00 will be credited against this debt for purposes of interest computation leaving a balance due of $15,895.26. Also, a payment of $220.00 in connection with entry No. 81-300505-6 will be credited to the estimated duties in that entry, leaving a balance due of $19,646.90 for purposes of interest computation.

As mentioned *supra*, in addition to interest, the Government's prayer for relief includes the request for the imposition of costs. The power of the Court of International Trade to award costs is, apparently, a question of first impression.

Under the Federal Rules of Civil Procedure, to which this Court's rules closely adhere, costs are governed by rule 54(d). However, in all candor, it must be pointed out that our rule 54 does not include a subdivision (d) covering costs as does the corresponding Federal Rule. Nonetheless, the Court of International Trade has the discretion to award costs against this defendant under 28 U.S.C. §§ 1920 and 2412, and such power is yet another tangible manifestation of the expanding jurisdiction of the Court of International Trade under the Customs Courts Act of 1980, P.L. 96–417.

It must be emphasized and reiterated that in this case, the defendant has played "fast and loose" by the issuance of checks for payment of estimated duties, which checks were unpaid for insufficiency of funds. It is plain that equity and the unique facts and circumstances of this case justify an award of costs to the Government.

Conclusion

Summary judgment is granted to plaintiff for $117,231.46 plus interest from the dates that estimated duties were due (ten working days after entry) until the date of payment of the judgment, calculated upon the rate of interest specified in 28 U.S.C. § 2644. Additionally, as noted, plaintiff's prayer for costs as provided for in 28 U.S.C. §§ 1920 and 2412 is allowed.

Judgment will be entered accordingly.

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571 F. Supp. 1261

RONALD R. NAGY, PLAINTIFF *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 81-4-00427

Before RE, *Chief Judge.*

On the Court's Motion for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed.]

(Decided September 16, 1983)

Ronald R. Nagy, pro se.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Sheila N. Ziff),* for the defendant.

RE, *Chief Judge:* Plaintiff challenges the Secretary of Labor's denial of certification of eligibility for trade adjustment assistance benefits for the former employees of Detail Production Company, Ferndale, Michigan. Specifically, the Secretary of Labor found that plaintiff and his fellow workers were service workers employed by a firm that did not produce an article within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1976). Hence, they were deemed ineligible for trade adjustment assistance benefits.

After reviewing the administrative record and the arguments of the parties, the court finds the Secretary's denial of certification supported by substantial evidence and in accordance with law.

On May 14, 1980, plaintiff, on behalf of himself and two other former employees of Detail Production Company (Detail), filed a petition with the Secretary of Labor (Secretary) for certification of eligibility for trade adjustment assistance benefits. Pursuant to section 221(a) of the Act, 19 U.S.C. § 2271(a) (1976) and 29 C.F.R. § 90.12 (1980), the Secretary published a notice of receipt of plaintiff's petition and the initiation of an investigation. 45 Fed. Reg. 40257 (1980).

Section 222 provides that the Secretary of Labor shall certify a petitioning group of workers as eligible for trade adjustment assistance benefits if he determines:

> (1) That a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) That sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) That increases of imports of articles like or directly competitive with *articles produced* by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. [Emphasis added.]

Plaintiff's petition was denied because it failed to satisfy the third eligibility criterion, *i.e.,* plaintiff's employer, Detail, did not produce an article that was adversely affected by increased imports.

Plaintiff claims that the work performed by the employees at Detail is "automotive related," and thus, the workers were part of the production process for new cars and trucks. Since their separation from employment allegedly was due to an increase in the importation of motor vehicles, plaintiff submits that Detail's employees are entitled to be certified as eligible for worker adjustment assistance benefits.

The Secretary's investigation disclosed that plaintiff's work activity at Detail consisted of splining blank four-wheel drive hubs provided by the Budd Company (Budd) which were returned to Budd for assembly into brake units for automobiles. Splining is a machine operation that cuts grooves or channels into the hub of a motor vehicle.

In denying certification of eligibility, the Secretary determined that the splining of hubs was a service and thus did not constitute the production of an article, as required by section 222 of the Trade Act of 1974. 46 FR 14495, 14496 (1981). Nevertheless, the Secretary stated that the workers at Detail could be certified if their separation from employment was caused importantly by a reduced demand for their services from a parent firm, *i.e.*, one which owned or otherwise substantially controlled Detail. In that event, the reduced demand for services must emanate from a production facility of the parent firm whose workers independently met the statutory criteria for certification. Furthermore, the reduction must relate directly to the product adversely affected by increased imports. The investigation disclosed that these conditions were not present for the petitioning workers. Thus, the Secretary concluded that they were not certifiable for eligibility for trade adjustment assistance benefits.

Thereafter, pursuant to section 284(a) of the Trade Act of 1974, 19 U.S.C. § 2395(a) (Supp. IV 1980), plaintiff commenced this action, by letter complaint, seeking judicial review of the Secretary's denial of certification.

On May 19, 1983, pursuant to Rule 56.1, the court, *sua sponte*, ordered that this action be deemed submitted on July 18, 1983 for review of the Secretary of Labor's determination upon the administrative record, and that the parties submit briefs addressing the relevant issues including:

> (1) Whether the plaintiff's employing firm was a firm that produced an import-impacted article within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1976); and
>
> (2) Whether the Secretary's findings and resultant determination denying plaintiff's certification of eligibility for trade adjustment assistance pursuant to section 223 of the Trade Act of 1974, 19 U.S.C. § 2273 (1976), are supported by substantial evidence contained in the certified administrative record file with the court.

The purpose of judicial review of a decision by the Secretary of Labor denying a petition for certification of eligibility for trade adjustment assistance benefits is to assure that the Secretary's determination is supported by substantial evidence contained in the administrative record and is in accordance with law. 19 U.S.C. § 2395(b) (Supp. IV 1980). The ownership of Detail Production Company, and the nature of the work performed there, are not in dispute. The question presented, therefore, is whether, in finding that plaintiff was not eligible for benefits because the employing firm did not produce an import-impacted article, the Secretary of Labor correctly interpreted and applied section 222(3) of the Trade Act of 1974.

A review of the administrative record reveals that the Secretary could not certify the workers at Detail as eligible for trade adjustment assistance benefits based on plaintiff's claim that they produced an import-impacted article. The article in question, a hub, is a component of a motor vehicle brake system, and thus, could not be considered directly competitive with the import-impacted finished article, a four-wheel drive motor vehicle. *See United Shoe Workers, AFL–CIO* v. *Bedell,* 506 F.2d 174 (D.C. Cir. 1974); *Machine Printers and Engravers Association* v. *Marshall,* 595 F. 2d 860 (D.C. Cir. 1979); *Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194 (6th Cir. 1982); and *Gropper* v. *Donovan,* 6 CIT 103, Slip Op. 83-86 (August 16, 1983).

Rather the Secretary focused his investigation on plaintiff's claim that the employees at Detail should be certified as eligible for benefits because their work was "automotive related," *i.e.,* they performed tasks ancillary to the production of a finished article, a four-wheel drive vehicle.

The Secretary maintains that plaintiff and his fellow workers performed a service, and that the performance of a service does not constitute production of an article under section 222 of the Trade Act of 1974. The Secretary further contends that the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification, and the reduction must directly relate to the product adversely impacted by imports.

Prior cases have examined the question of whether services are "articles," within the meaning of the worker adjustment assistance eligibility requirement of section 222(3). *Fortin* v. *Marshall,* 608 F. 2d 525 (1st Cir. 1979); *Pemberton* v. *Marshall,* 639 F. 2d 798 (D.C. Cir. 1981); *Woodrum* v. *Donovan,* 5 CIT 191, Slip Op. 83-43, 564 F. Supp. 826 (May 10, 1983); and *Miller* v. *Donovan,* 6 CIT 67, Slip Op. 83-78 (July 27, 1983).

In *Fortin,* former employees of an airline who performed a variety of passenger, cargo, mechanical, administrative and managerial tasks appealed the denial of their petition for certification of eligibility for trade adjustment assistance benefits. The court held that services were not "articles" as that term is used in section 222, and affirmed the Secretary's finding. The court, in interpreting the words of the statute, stated that "[w]hen read in the context of the entire Trade Act, * * * it becomes clear that the term 'article' was plainly meant to refer to a tangible thing and not to a service." *Fortin,* at 527. Thus, the court concluded that "[t]o interpret air transportation services as 'article produced' within the meaning of

19 U.S.C. § 2272(3) is to strain severely, if not fracture, the statutory language." *Id.*

In *Pemberton*, the Court of Appeals affirmed the Secretary's decision that workers at a shipyard, whose work involved mainly repair and maintenance of marine vessels, were not involved in the creation of articles for purposes of the Trade Act of 1974 and, thus, were not eligible for trade adjustment assistance. The court in *Pemberton* made the following pertinent observation:

> The repair and maintenance of a ship is clearly a service to an existing commodity. Even if the repair necessitates the use of new materials, it cannot be said to be the creation of a new ship any more than overhauling an automobile can be said to be manufacturing a car. * * *
>
> *Fortin* * * * leaves no doubt that services do not fall within the terms of § 2272. * * * Appellants contend that *Fortin* is distinguishable because in that case nothing tangible was produced. In our situation, the service did involve a tangible item—a ship—but the *same* item was also the end product. There was no transformation, but a mere refurbishing of what already existed. [Emphasis in original.] [Footnote omitted.]

Pemberton, at 800.

These cases clearly demonstrate that the term "article," as used in section 222(3) of the Trade Act of 1974, does not embrace activity by a worker that does not result in the creation or manufacture of a tangible commodity, or that does not cause the transformation of an existing product into a new and different article.

There is no doubt that plaintiff's work, *i.e.*, splining, was performed on a tangible article. Nevertheless, plaintiff did not create or manufacture a tangible commodity, or transform it into a new and different article. The hub was clearly the beginning and the end product. Plaintiff and his co-workers merely serviced an already completed article, a hub, which was returned to the supplier, Budd, for assembly into brake units for four-wheel motor vehicles.

In two recent cases this court examined the question whether workers engaged in servicing automobiles were employed by a firm that produced an "article" within the meaning of section 222(3) of the Trade Act of 1974.

In *Woodrum*, plaintiffs, on behalf of the former employees of an automobile dealership, challenged a denial certification of eligibility for benefits under the worker adjustment assistance program. The Secretary denied certification for plaintiff's because they were employed by a firm that did not produce an article that was adversely affected by increased imports. Plaintiffs contended that neither *Fortin* nor *Pemberton* were applicable to their respective situations because, unlike them, the workers in those cases were not part of the production process. Plaintiffs further contended that, regardless of the nature of their work, the court should consider them as part of the production process for new automobiles because their labor was essential to the final delivery of those automobiles to the general public.

In rejecting plaintiffs' contentions, this court said:

> * * * It is clear that production under section 222(3) requires the manufacture or creation of something tangible. The *Pemberton* test is whether the workers in question transformed articles into new and different articles.
>
> It is difficult to quarrel with the reasoning of *Pemberton* for it cannot be questioned that "produce" means to give birth, create or bring into existence.
>
> There is no doubt that plaintiffs' work was performed on tangible articles, Chrysler cars. By their own admission, however, plaintiffs did not manufacture new articles. Rather, their work consisted of adjustments and preparation of the tangible article which was also the end product. As in *Pemberton,* plaintiffs Woodrum, Johnson and Dorsey merely made repairs and serviced already completed articles. There is no evidence which indicates that plaintiffs made substantial changes to the new Chrysler carts resulting in their transformation into a new end product. * * *

Woodrum, Slip Op. at 16–17.

Similarly, in *Miller,* this court affirmed the Secretary's determination that employees, whose work consisted solely of selling and servicing completed articles, *i.e.,* cars and trucks, were ineligible for trade adjustment assistance benefits inasmuch as they, too, were service workers who did not produce an import-impacted article.

From the foregoing, it is clear that plaintiff was not employed by a firm that produced an import-impacted article within the meaning of section 222(3) of the Trade Act of 1974. The record before the court fails to disclose any evidence that plaintiff performed any work that created or manufactured a tangible commodity, or that transformed an existing product into a new and different article.

Accordingly, it is the conclusion of the court that the Secretary of Labor's denial of certification is supported by substantial evidence and in accordance with law. The Secretary's determination is therefore affirmed.

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573 F. Supp. 117

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. AND E. C. MCAFEE COMPANY, PLAINTIFFS *v.* UNITED STATES OF AMERICA, U.S. CUSTOMS SERVICE, AND THE COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 83-7-00995

Before CARMAN, *Judge.*

Memorandum and Order

[Motion to dismiss all entries except Entry No. 337670 granted; Motion for preliminary injunction denied] [Motion to dismiss action as to plaintiff E. C. McAfee denied without prejudice; Motion to dismiss Counts I and III of the complaint denied without prejudice.]

(September 20, 1983)

Sandler & Travis, P.A., (Leonard L. Rosenberg on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Kenneth N. Wolf* on the motion) for the defendants.

CARMAN, *Judge:* This matter is before me on plaintiffs' motion for a preliminary injunction and defendants' motions for partial dismissal and/or partial; summary judgment.

Plaintiffs request in their motion for a preliminary injunction, pursuant to Rule 65(a) of the Rules of the United States Court of International Trade, that this court:

a. Cancel all liquidations occurring after October 17, 1980 of plaintiffs' entries of certain made-to-measure clothing exported from Hong Kong.

b. Refrain from liquidating any of plaintiffs' entries of certain made-to-measure clothing exported from Hong Kong in violation of Customs Ruling CLA-2: RRUCV 065056 CW TAA #10;

c. Refrain from acting on any protests filed by plaintiffs or their sureties in connection with the liquidation of entries of certain made-to-measure clothing exported from Hong Kong;

d. Refrain from implementing any directive, policy statement or ruling that would result in the liquidation of plaintiffs' entries of certain made-to-measure clothing exported from Hong Kong, or in the disposition of any pending protests filed by plaintiffs or their sureties in connection with the liquidation of such entries;

e. Refrain from initiating any demands on the plaintiffs' sureties for payment of additional duties on entries of certain made-to-measure clothing exported from Hong Kong.

The parties in this case have stipulated to the following facts:

1. The plaintiff. AMERICAN AIR PARCEL FORWARDING COMPANY, LTD. ("AAP"), is a corporation organized and existing under the laws of Hong Kong.

2. The particulars regarding entry, liquidation and protest the specific entry of which is the subject of this action are as follows:

Entry No.	Entry date	Date of liquidation
337670	1/2/81	3/5/82

Protest Number: 3802-2-000672

Protest Filed: June 1, 1982

Protest Denied: April 21, 1983

3. All duties demanded of the importer at time of liquidation of Entry No. 337670 of January 2, 1981, have been paid prior to the filing of this action by a check drawn by AAP's surety, St. Paul Fire and Marine Insurance Company.

4. The merchandise which is the subject of this action is various items of wearing apparel.

5. On or about January 16, 1980, following discussions with plaintiff AAP regarding the valuation of the merchandise AAP imported from Hong Kong, the District Director of Customs, Detroit, Michigan, requested internal advice of Customs Service Headquarters pursuant to 19 CFR § 177.11 regarding the appraisement of AAP's merchandise.

6. On October 17, 1980, in response to the aforesaid request for internal advice, the Director, Classification and Value, Headquarters issued a ruling identified as follows: CLA-2: RRUCA 065056CW TAA #10 (hereinafter referred to as "TAA #10"). (TAA #10 is also known as IA 25/80.)

7. On March 11, 1981, the Customs Service published TAA #10 in the CUSTOMS BULLETIN (15 Cust. Bull. & Dec., No. 10). TAA #10 was identified as C.S.D. 81-72 at the time of its publication.

8. Subsequent to the issuance of TAA #10, the Director, Classification and Value in San Francisco requested reconsideration of TAA #10 as it related to appraisement of merchandise on the basis of transaction value under Section 402(b), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 and the Director, Classification and Value in Detroit submitted a memorandum to Customs Service Headquarters in Washington, D.C. in support thereof.

9. On July 23, 1981, Customs Service Headquarters in a ruling referred to as CLA-2: RRUCV, 542406 BLS, affirmed TAA #10.

10. On September 9, 1981, Customs Service Headquarters issued a telex directed to, *inter alia,* District Directors, San Francisco and Detroit, pertaining to TAA #10.

11. Neither plaintiffs nor the importing public were given prior notice of the telex dated September 9, 1981.

12. On October 19, 1981, Customs issued a ruling referred to as: CLA-2-CO:R:CV:V, 542643 TLL, TAA #40 (hereinafter referred to as TAA #40).

13. TAA #40 revoked TAA #10.

14. TAA #40 revoked TAA #10 retroactively, citing section 177.9(d) of the Customs Regulations (19 C.F.R. § 177.9(d)) as authority for that action.

15. TAA #40 was never published in the CUSTOMS BULLETIN, Federal Register, or in any other publication which would give the general importing public notice of its contents.

16. The defendants did not seek the comments of the plaintiffs or the general public prior to the issuance of TAA #40.

17. Defendants did not publish a notice in the *Federal Register* or the CUSTOMS BULLETIN that #10 was under review.

18. Subsequent to the revocation of TAA #10, many entries made by the plaintiffs were liquidated at values two (2) to three (3) times as great as the entered values, thereby causing bills for increased duties to be issued in the amounts in excess of approximately $20,000 and $30,000 per entry.

19. The total increased duties due from the plaintiffs on or before October 18, 1983, is in excess of one million dollars ($1,000,000).

20. The duties due on October 18, 1983, are due in connection with protests denied on April 21, 1983.

21. Demands for payment of increased duties have been made upon plaintiffs' surety companies.

22. Plaintiff AAP has placed itself within the protection of the United States Bankruptcy Court.

23. Increased duties have been paid only as to Entry No. 337670.

JURISDICTION

Plaintiffs commenced this action on July 14, 1983[1] to contest the United States Customs Service's (hereinafter "Customs Service") appraisement of Entry No. 337670 of made-to-measure clothing from Hong Kong dated January 2, 1981, to obtain judicial review of the Customs Service's alleged revocation of an internal advice decision TAA #10, and to seek an injunction as to Entry No. 337670 and other numerous entries.

It has been conceded by the defendants that this court has jurisdiction over Entry No. 337670 of January 2, 1981, pursuant to 28 U.S.C. § 1581(a) (Supp. V 1981)[2] since plaintiffs have exhausted

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[1] Plaintiffs secured on August 31, 1982 from this court a preliminary injuction concerning the same items as the instant case, reinstating C.S.D. 81-72 (TAA #10) as initially promulgated and cancelling all prior liquidations not in accordance with C.S.D. 81-72 (TAA #10). *American Air Parcel Forwarding Co.* v. *United States*, 4 CIT 94 (1982). Defendants subsequently, on January 19, 1983, 5 CIT 8, 557 F. Supp. 605, *Appeal docketed*, No. 83-716 (Fed. Cir. Jan 23, 1983), secured a dissolution of the preliminary injunction and a dismissal of the action citing *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 687 F.2d 467 (1982).

In *American Air Parcel, supra*, Judge Landis stated: "It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) as the latter section was not intended to create any new causes of action not founded on other provisions of law." 557 F. Supp. at 607 (footnote omitted).

Plaintiffs also filed a suit in the United States District Court of Michigan, Southern Division, which plaintiffs characterized as identical to the case before Judge Landis. Judge Patricia Boyle dismissed this case and plaintiffs have moved for a rehearing before Judge Boyle.

[2] 28 U.S.C. § 1581(a) provides:

Continued

their administrative remedies and paid the increased duties as to this entry. The defendants object to this court taking jurisdiction over other numerous and unspecified entries set forth by the plaintiffs.

With respect to the numerous and unspecified entries, although plaintiffs have exhausted their administrative remedies, they have not paid the additional duties that have been assessed. Since the tender of additional duties determined to be due on liquidation is a condition precedent to invoking the jurisdiction of this court pursuant to 28 U.S.C. § 2637(a) (Supp. V 1981),[3] this court lacks subject matter jurisdiction as to all entries for which the additional duties have not been paid. *United States* v. *Boe,* 64 CCPA 11, 18, C.A.D. 1177, 543 F.2d 151 (1976); *Dexter* v. *United States* 78 Cust. Ct. 179, C.R.D. 77-1, 424 F. Supp. 1069 (1977).

It has been argued by the plaintiffs that the circumstances of this case give rise to jurisdiction under 28 U.S.C. § 1581 (i)(4) (Supp. V 1981),[4] citing *Schaper Manufacturing Co.* v. *Reagan,* 5 CIT 266, 566 F.Supp. 894 (1983).[5] Plaintiffs assert that they are seeking enforcement of regulations concerning the establishment and revocation of a uniform practice and specifically the process surrounding the revocation of TAA #10 thereby providing this court with subject matter jurisdiction. This court cannot agree with this assertion of jurisdiction.

In *United States* v. *Uniroyal Inc.,* 69 CCPA 179, 687 F.2d 467 (1982), the court clearly stated that 28 U.S.C. § 1581(i) cannot be used to circumvent the procedures of 28 U.S.C. 1581(a), and noted that the legislative history of section 1581 evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest. An importer must file a protest, receive a denial of that protest and pay the assessed duties before the jurisdiction of this court can be invoked. Subject matter jurisdiction under section 1581(i) of a cause of action, which might otherwise be available under section 1581(a), lies only when the relief available under section 1581(a) is manifestly inadequate or necessary because of special circumstances to avoid extraordinary and unjustified delays caused by the exhaustion of administrative

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The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[3] 28 U.S.C. § 2637(a) provides:

A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges or exactions have been paid at the time the action is commenced * * *.

[4] 28 U.S.C. § 1581(i)(4) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[5] In *Schaper*, the issues involved regulation 19 C.F.R. 133.43 and statutes 19 U.S.C. § 66 and 1624 and their interrelationship. If jurisdiction was to be invoked in *Schaper*, it had to be found under section 1581(i) since the issues were not protestable or reviewable under any other section. The plaintiffs in *Schaper*, unlike the plaintiffs in the case at hand, did not have the availability of 28 U.S.C. § 1581(a).

remedies. *United States Cane Sugar Refiners' Association* v. *Block*, 69 CCPA 172, 683 F.2d 399 (1982); *Lowa, Ltd.* v. *United States*, 5 CIT 81, 561 F. Supp. 441 (1983), *appeal docketed*, No. 83-1018 (Fed. Cir. May 13, 1983). This court does not find that section 1581(a) is manifestly inadequate or that special circumstances exist in this case.

Therefore, defendants' motion for partial dismissal as it relates to entries other than Entry No. 337670 is granted.

Plaintiffs' Motion for Preliminary Injunction

Having determined that this court has subject matter jurisdiction only as to Entry No. 337670, the court now turns to plaintiffs' motion for a preliminary injunction as to that one entry.[6]

In order to prevail on a motion for a preliminary injunction, the petitioner must show (1) that without the relief requested the petitioner will be irreparably injured; (2) that there is a substantial likelihood of success on the merits; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested. *S.J. Stile Assoc., Ltd.* v. *Snyder*, 68 CCPA 27, C.A.D. 1261, 646 F.2d 522 (1981).

The plaintiffs have not shown that absent an injunction relating to Entry No. 337670, the only entry over which this court has jurisdiction, they will suffer immediate irreparable harm. The harm suffered by the plaintiff is that associated with increased duties as to Entry No. 337670, and this harm alone cannot be found to rise to the level of immediate irreparable harm demanding extraordinary equitable relief. Given the circumstances of the case, the requirement of the payment of duties, in which there is an established administrative process for the review of the assessment of those duties, cannot be seen as a threat of immediate irreparable harm. Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. *Parks* v. *Dunlop*, 517 F. 2d 785 (5th Cir. 1975) (per curiam).

Plaintiffs argue that the action of the Customs Service imposing higher appraised values in accordance with the telex of September

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[6] Plaintiffs have argued that for purposes of equitable relief only, that is, the motion for preliminary injunction, this court can look to all entries identified to the court in order to maintain the status quo, citing *Zenith Radio Corp.* v. *United States*, 1 CIT 53, 505 F. Supp. 216 (1980).

The court cannot agree with the plaintiffs and cannot find authority in *Zenith* for taking jurisdiction over entries where the jurisdictional prerequisites have not been met merely because jurisdiction over one entry exists. As noted in *Dexter* v. *United States*, 78 Cust. Ct. 179, C.R.D. 77-1, 424 F. Supp. 1069 (1971), "[u]ntil the entries are liquidated and protests denied this court has no jurisdiction over them, not even by way of its jurisdiction over another entry of exactly the same merchandise." 78 Cust. Ct. at 181, 424 F. Supp. at 1071. *See also Flinthote Co.* v. *United States*, 82 Cust. Ct. 305 C.R.D. 79-5, 467 F. Supp. 626 (1979).

This court finds no authority to support the proposition that equitable powers can be used to expand the jurisdiction of the court. Plaintiffs assert that defendants' arguments are pre-1980; that is, they do not consider the enactment of 28 U.S.C. § 1585 (Supp. V 1981) which provides: "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." However, 28 U.S.C. § 1585 is not a jurisdictional grant, but merely a grant of equitable powers. Therefore, plaintiffs' argument must fail.

9, 1981 and TAA #40 will drive them out of business causing immediate irreparable harm. However, a direct correlation between bankruptcy and the payment of duties as to this one entry over which this court has jurisdiction is at best speculative. The fact that the requirement by the Customs Service of the payment of duties will deteriorate the plaintiffs' financial situation cannot be seen as irreparable harm demanding the extraordinary remedy of a preliminary injunction.

Furthermore, the equitable powers of the court are properly invoked only when there is an inadequate remedy at law. *Younger* v. *Harris,* 401 U.S. 37, 43–44 (1971). In the case at hand, there is an adequate remedy at law. Plaintiff AAP caused to be tendered on its behalf liquidated duties in the amount of $38,222.46 as a result of the denial of the protest filed with respect to the action by Customs regarding Entry No. 337670, and the timely filing of a summons and complaint invoked this court's jurisdiction under 28 U.S.C. § 1581(a). With respect to this entry, an adequate remedy at law exists; that is, a money judgment refunding the duties paid. The payment of duties and the exhaustion of administrative remedies can also invoke this court's jurisdiction to review an alleged action of the Customs Service revoking an asserted uniform practice.

Therefore, given that plaintiffs' motion for a preliminary injunction must fail if any one of the prerequisites for a preliminary injunction has not been established by the plaintiffs, and this court cannot find an immediate threat of irreparable harm to the plaintiffs, plaintiffs' motion for a preliminary injunction must be denied.

Defendants' Motion to Dismiss Counts I and III of the Complaint and Defendants' Motion to Dismiss the Action as to Plaintiff E. C. McAfee Company.

In addition to defendants' motion to dismiss all entries other than Entry No. 337670, defendants have moved that Counts I and III of the complaint be dismissed as well as the action be dismissed as it relates to plaintiff E. C. McAfee Company and Entry No. 337670 for lack of standing to prosecute. Defendants also request in the alternative partial judgment on the pleadings and/or partial summary judgment as to Count I of plaintiffs' complaint insofar as it relates to the alleged revocation of a uniform practice.

Defendants' motion to dismiss Counts I and III of the complaint is denied without prejudice.

CONCLUSION

For the above-mentioned reasons, the court orders the following: (1) Defendants' motion to dismiss all entries except Entry No. 337670 is granted; (2) Plaintiffs' motion for a preliminary injunction is denied; (3) Defendants' motion to dismiss Counts I and III of the complaint is denied without prejudice; (4) Defendants' motion to dismiss the action as to plaintiff E. C. McAfee Company is denied without prejudice.

It is so ordered.

572 F. Supp. 275

Republic Steel Corp., United States Steel Corp., et al., plaintiffs *v.* United States, et al., defendants, and Companhia Siderurgica Paulista, et al., defendants-intervenors

Consolidated Court No. 82-3-00372

Before Watson, *Judge.*

Memorandum Opinion and Order

The Court denied U.S. Steel Corporation's motion for access to business confidential documents, in part for lack of standing, in part for lack of necessity and in part for requiring access for in-house counsel, which the Court sees as creating a risk of inadvertent disclosure, avoidable by means of reasonable alternatives.

[Motion for access denied.]

(Decided September 23, 1983)

Law Department of United States Steel Corporation (D. B. King, J. J. Mangan, C. D. Mallick, L. Ranney and *P. J. Koenig* of counsel) for plaintiff United States Steel Corporation.

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch (*A. David Lafer* and *Francis J. Sailer,* attorneys, Commercial Litigation Branch) for the federal defendants.

Office of the General Counsel, International Trade Commission *Michael H. Stein,* General Counsel; *Michael P. Mabile,* Assistant General Counsel; *Warren H. Maruyama,* Attorney).

Wald, Harkrader & Ross (William H. Barringer, Christopher A. Dunn and *Arthur J. Lafave III* of counsel) for defendants-intervenors COSIPA and USIMINAS.

Watson, *Judge:* United States Steel has moved for access to certain business confidential documents in the administrative record filed in this consolidated action, brought under 19 U.S.C. § 1516a(a).[1] The documents are part of the administrative records in determinations made by the International Trade Commission, that there were no reasonable indications of material injury from importations of certain steel products from Brazil, Spain and the Republic of Korea.[2]

The federal defendants and defendant-intervenors COSIPA and USIMINAS have opposed the motion. The Court denies the motion for two reasons. United States Steel did not bring an action for judicial review of the determinations regarding the importations from Brazil and Spain and therefore has no standing or justification for seeking access to material in those administrative records.[3] The consolidation of its case with others is a matter of judicial efficiency and did not enlarge its action or the rights flowing from that action.

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[1] In deciding this motion, the Court has also considered the earlier briefs of U.S. Steel filed in this action, dated August 6, 1982 and September 24, 1982 and, from Court No. 82-10-01361, the brief of Corporate Counsel, dated August 19, 1982, the transcript of oral argument dated August 19, 1982 as well as U.S. Steel's brief dated March 4, 1983.

[2] These determinations were published in *Certain Carbon Steel Products from Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom, and West Germany,* Inv. Nos. 701-TA-86 through 144, 701-TA-146, 701-TA-147 (Preliminary), Inv. Nos. 731-TA-53 through 86 (Preliminary), USITC Pub. No. 1221 (1982), *Certain Steel Products from the Republic of Korea,* Inv. Nos. 701-TA-170 through 173 (Preliminary), USITC Pub. No. 1261 (1982), and *Certain Steel Products from Spain,* Inv. Nos. 701-TA-155 through 163 (Preliminary), USITC Pub. No. 1255 (1982).

With respect to the determination on importations from Korea, which U.S. Steel did challenge, the Court has examined the material requested *in camera* and has confirmed the fact that it consists of a wide range of business confidential information of ineradicable impressiveness and competitive importance.

Some of the material does not contain any information regarding cold-rolled steel sheet from Korea. This is true of documents 4, 5, 7 and 8 in the category of importers' questionnaires; documents 58, 59, 60, 62 through 76 and 78 through 94 in the category of purchasers' questionnaires and documents 38 through 56 in the category of lost sales questionnaires. As to those documents, U.S. Steel's motion for access is denied as unnecessary.

With respect to the remaining documents, which includes the documents listed in footnote 3, the Court accepts U.S. Steel's need for access but denies the motion. The need for access is outweighed by the potential danger which the Court sees in disclosure to in-house counsel and the resulting possibility of inadvertent disclosure. The Court is of the opinion that in this situation the alternative available to U.S. Steel of retaining outside counsel is reasonable and necessary. The Court has explained its rationale in more detail in *United States Steel Corp.* v. *United States,* 6 CIT 55 (1983) and incorporates that opinion herein.

For the reasons given above the motion for access by U.S. Steel is DENIED.

Plaintiff U.S. Steel has asked the Court to certify this question for appeal and in response the Court states that, with respect to U.S. Steel's interests in this action, this decision involves a controlling question of law with respect to which there is a substantial ground for difference of opinion. An immediate appeal from this decision may materially advance the ultimate termination of the litigation being conducted by U.S. Steel.

U.S. Steel has requested a stay of these proceedings pending appeal. The continued progress of the litigation involving other plaintiffs in this consolidated action would be interrupted and no sufficient reason has been given for such an interruption. Accordingly, U.S. Steel's motion for a stay is DENIED.

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[3] The ITC has stated that certain domestic producers' questionnaires from the administrative record in *Certain Steel Products from Spain,* Inv. Nos. 701-TA-155 through 163 (Preliminary) USITC Pub. No. 1255 (1982) were used in the investigation of steel products from Korea. The Court considers those to be also part of the administrative record in the Korean determination and, as to them, U.S. Steel's motion for access is denied, not for reasons of standing, but for the reasons given with respect to disclosure to in-house counsel. Those documents are found in the aforementioned Spanish administrative record in the category of producers' questionnaires and are numbered 15, 16, 18, 19, 20, 21, 23, 24, 26, 28, 29, 30, 31, 33, 34 and 35.

572 F. Supp. 883

Diversified Products Corporation, plaintiff v. United States, defendant, and Stewart-Warner Corporation, intervenor

Court No. 82-7-01065

Before Maletz, *Senior Judge.*

Opinion and Order

Lamb & Lerch; Richard J. Kaplan, of counsel, (*Sidney H. Kuflik* on the briefs) for plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Robert F. Seeley,* International Trade Administration, U.S. Department of Commerce, of counsel (*Francis J. Sailer* on the briefs) for defendant.

Eugene L. Stewart, Terence P. Stewart and *Jeffrey S. Beckington* for intervenor.

(Decided September 27, 1983)

Maletz, *Senior Judge:* Presented for the court's consideration is a challenge to the final results of an administrative review conducted by the Department of Commerce, International Trade Administration (ITA), pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (Supp. IV 1980).[1] That review involved a clarification of the scope of a dumping finding[2] issued by the government in 1972. *See* 47 Fed. Reg. 28,978 (1982). Although a series of attacks are mounted against the ITA's section 751 review, the pivotal question is whether certain merchandise—double-gear hub drive speedometers—sold by plaintiff during the section 751 review period is of the same class or kind as that named in the initial 1972 dumping finding.

Plaintiff Diversified Products Corp. (Diversified), an importer of double-gear hub drive speedometers, has moved for judgment on the administrative record pursuant to rule 56.1 of the rules of this court. The government has cross-moved for an affirmance and a partial remand in order that the ITA may redetermine the amount of estimated antidumping duties to be deposited on speedometers manufactured by one of the foreign firms with whom Diversified deals. For the reasons that follow, Diversified's motion is denied and the government's cross-motion is granted.

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[1] That section provides in part:

§ 1675. *Administrative review of determinations*

(a) *Periodic review of amount of duty*

(1) *In general*

At least once during each 12-month period beginning on the anniversary of the date of publication of * * * an antidumping duty order under this subtitle or a [dumping] finding under the Antidumping Act, 1921, * * * the administering authority [the ITA] * * * shall—

* * * * * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, . . .

* * * * * * *

(2) *Determination of antidumping duties*

For the purpose of paragraph (1)(B), the administrating authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

[2] The phrase "dumping finding" used in the Antidumping Act of 1921 was replaced by the expression "antidumping duty order" under the Trade Agreements Act of 1979.

I

Background

The history of this antidumping duty proceeding began in 1971 when a complaint was filed by intervenor Stewart-Warner Corp. with the Treasury Department requesting initiation of a dumping investigation of bicycle speedometers from Japan. A year after the complaint was filed Treasury determined that bicycle speedometers from Japan were being sold at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, 19 U.S.C. § 160(a) (1970).

For its part, the U.S. Tariff Commission (now the U.S. International Trade Commission) concluded that an industry in the United States was being injured by reason of the importation of those bicycle speedometers. In the course of its injury investigation the Tariff Commission submitted questionnaires to importers and domestic producers. In the definitions section of those questionnaires the term "bicycle speedometers" was defined as

> an instrument attached to a bicycle *or exercise machine* consisting of (1) a head which records miles per hour (MPH) and distance traveled (odometer), whether or not the instrument also indicates rotations per minute (RPM); (2) drive assembly; and (3) cable. [Emphasis added.]

The staff report to the Tariff Commission further reflects an inclusion of speedometers used on both bicycles and exercise machines in its consideration of the product subject to its investigation.

Following the Tariff Commission's injury determination, Treasury published its dumping finding. *See* 37 Fed. Reg. 24,826 (1972).

Shortly after enactment of the Trade Agreements Act of 1979—specifically section 751—the ITA embarked on its statutory task of reviewing all prior dumping findings of the Treasury Department, including the present one. In the preliminary results of its administrative review of the bicycle speedometer dumping finding, the ITA tentatively determined that double-gear hub drive speedometers were not within the scope of the 1972 dumping finding, reserving an ultimate decision on the scope question until publication of the final results of its section 751 review.

The ITA—after reviewing the Tariff Commission's record in the 1972 injury investigation, conducting its own hearing, and considering interested parties' post-hearing briefs—rendered its final results of administrative review which, as previously indicated, included the double-gear hub drive speedometers within the scope of the 1972 dumping finding. Diversified thereupon brought this action, pursuant to 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 1581(c), challenging the ITA's section 751 review.[3]

Before turning to Diversified's principal contention that double-gear hub drive speedometers are beyond the scope of the 1972 dumping finding, the court first addresses three subsidiary claims advanced by it: (1) that the transitional rules of the Trade Agreements Act of 1979 prohibit the ITA from conducting a section 751 review in the circumstances presented here; (2) that the ITA is not empowered to clarify the scope of a dumping finding; and (3) assuming *arguendo* it is so empowered, that the ITA is bound by classification determinations of the Customs Service when clarifying the scope of a dumping finding.

II

The Transitional Rules

Pointing to section 1002(b)(3) of the transitional rules of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 307,[4] Diversified argues that the ITA is powerless to review, much less clarify, the scope of a dumping finding if no assessment of antidumping duties was made prior to the effective date of that Act on the merchandise which is the subject of that finding. Diversified reaches this conclusion based on the contention that the word "review" appearing in section 1002(b)(3) refers to administrative, not judicial, review. The court disagrees.

The court is of the view that precisely the converse is true, that section 1002(b)(3) controls a party's right to judicial, not administrative, review. First of all, section 1002 is one of two sections contained in Title X of the 1979 Act, tellingly entitled "Judicial Review." Second, clear congressional authorization to conduct an administrative review of all pre-Trade Agreements Act dumping findings still in force on the Act's effective date is found in section 106(a) of that Act, 93 Stat. at 193, which states:

> **Sec. 106. Conforming Changes.**
>
> (a) *Repeal of Old Law.*—The Antidumping Act, 1921 (19 U.S.C. 160 et seq.) is hereby repealed but findings in effect on the effective date of this Act, or issued pursuant to court order

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[3] Intervenor advances the somewhat curious argument that this action is not ripe for judicial review in that there is no final agency action until antidumping duties have been assessed. While this argument would have some remote plausibility were judicial review being conducted under the Administrative Procedure Act, 5 U.S.C. § 704 (1976), the short answer is, of course, that it is not. Rather, 19 U.S.C. § 1516a(a)(2)(A) and (B)(iii), which governs here, unmistakably provides for judicial review of all section 751 administrative reviews within thirty days of the date they are published in the Federal Register.

[4] That section provides:

Certain Countervailing and Antidumping Duty Assessments.—The amendments made by this title shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

> in an action brought before that date, shall remain in effect, subject to review under section 751 of the Tariff Act of 1930.

In construing that section this court made clear that section 106(a) "makes old 'findings' subject to review under section 751 without limitation." *Matsushita Electric Industrial Co., Ltd.* v. *United States,* 2 CIT 263, 266, 529 F. Supp. 670, 673 (1981).

Finally, the legislative history of section 1002(b)(3) indicates that the purpose of that section is to preserve an interested party's opportunity to obtain judicial review of the administrative determinations underlying a dumping finding in those circumstances where no such opportunity had arisen prior to the effective date of the Trade Agreements Act. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 183 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 255 (1979). *reprinted in* 1979 U.S. Code Cong. & Ad. News 641 ("according to subsection 1002(b)(3), * * * [i]f no assessment of a countervailing or antidumping duty was made before the effective date * * *, then a challenge to the underlying finding or order would be subject to judicial review without regard to the amendments made by title X * * *").

In short, section 1002(b)(3) refers to judicial review; it does not preclude the ITA from reviewing a pre-Trade Agreements Act dumping finding for the purpose of ascertaining its scope.

III

The ITA's Power to Clarify

Diversified next proffers two interrelated contensions. The first is that the ITA has no authority to determine in the course of a section 751 review whether a particular imported article is within the scope of a dumping finding. Rather, it submits, this responsibility is within the exclusive purview of the Customs Service. Diversified bases its conclusion on a literal reading of section 751 which, it contends, is devoid of any express grant of power to the ITA to determine whether a given article is encompassed by a dumping finding. As a corollary to this, Diversified submits that even if the ITA is empowered to clarify the scope of dumping findings, it is nevertheless bound by classification determinations of the Customs Service when so clarifying. The court finds each of these contentions without merit.

While it is true that "[t]he starting point in every case involving construction of a statute is the language itself, "*Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975), nevertheless, the Supreme Court has "repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, * * *" *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962). *See also Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 565 (1980). In this connection,

> [I]t is one of the surest indexes of a mature and developed jurisprudence * * * to remember that statutes have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. *Markham,* 148 F. 2d 737, 739 (2d Cir.), *aff'd,* 326 U.S. 404 (1945).

Turning then to a consideration of section 751, that section is pregnant with the implication that it is the ITA's exclusive responsibility to clarify the scope of dumping findings. It provides that the ITA shall determine the value and price of "merchandise subject to the antidumping duty order and included within that determination, * * *" Section 751 goes on to state that the ITA "shall publish notice of the results of the determination of antidumping duties * * *, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination.* * *" That section makes no mention of the Customs Service.

What is more, in *Royal Business Machines* v. *United States,* 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd,* 69 CCPA —, 669 F. 2d 691 (1982), this court implicitly recognized that the ITA has the authority not only to define the scope of an antidumping duty investigation but also to clarify the statement of its scope:

> The court distinguishes between the authority of the Customs Service to classify according to tariff classifications (19 U.S.C. § 1500) and the power of the agencies administering the antidumping law to determine a class or kind of merchandise. The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service. Within the context of an antidumping proceeding the administering agency, at the proper time, can define the class in its terms.
>
> The Customs Service is placed in a ministerial role by the antidumping law. * * * Accordingly, it may not independently modify, directly or indirectly the determinations, their underlying facts, or their enforcement.

Id. at 87 n.18, 507 F. Supp. at 1014 n.18. It follows that if Customs is relegated to a mere "ministerial role," then the ITA necessarily must have the power to clarify the scope of a prior dumping finding.

Finally, it is the ITA which directs Customs to assess antidumping duties on given classes or kinds of merchandise and it is Customs which serves at the behest of the ITA in administering the antidumping duty law. *See* 19 U.S.C. §§ 1673e(a)(1) and 1673h. To this end, it is the statutory responsibility of the ITA to describe for Customs "the class or kind of merchandise * * * in such detail as the administering authority [the ITA] deems necessary. * * * " 19 U.S.C. § 1673e(a)(1).

In short, starting from those areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before the court, *see Montana Power Co.* v. *FPC*, 445 F. 2d 739, 746 (1970), *cert. denied*, 400 U.S. 1013 (1971); *Asahi Chemical Industry Co.* v. *United States*, 4 CIT 120, 548 F. Supp. 1261 (1982), the Trade Agreements Act of 1979 is instinct with the intent that the ITA, not the Customs Service, is responsible for clarifying, where necessary, the scope of dumping findings and antidumping duty orders.

From all that has been said, it is equally clear that the ITA is in no wise obligated to follow nor is it bound by the classification determinations of Customs when it does clarify the scope of a dumping finding. On this score, Diversified contends that inasmuch as Customs has classified double-gear hub drive speedometers as "other than" bicycle speedometers, it is error for the ITA to include such speedometers as being within the class or kind of merchandise covered by the 1972 dumping finding. The short answer to this contention, of course, is contained in the previously quoted portion of the *Royal Business Machines* decision, namely, that "[t]he determinations under the antidumping law may properly result in the creation of classes which do not correspond to [tariff schedule] classifications * * * or may define or modify a known classification in a manner not contemplated or desired by the Customs Service." *Id.* at 87 n.18, 507 F. Supp. at 1014 n.18. While harmony between these two agencies would certainly be a felicitous state of affairs, nothing in the Trade Agreements Act requires them to perform their respective functions in lock step.

Having disposed of these preliminary matters, the court addresses the crux of Diversified's motion—that the ITA's determination that double-gear hub drive speedometers are within the class or kind of merchandise encompassed by the 1972 dumping finding is unsupported by substantial evidence on the record, or otherwise is not in accordance with law.

IV

The ITA's Section 751 Review

This court must enforce the ITA's determination if the ITA correctly applied the law and if its findings are supported by substantial evidence on the record viewed as a whole. *See Penntech Papers, Inc.* v. *NLRB*, 706 F. 2d 18, 22-23 (1st Cir. 1983); 19 U.S.C. §1516a(b)(2)(B) (Supp. IV 1980). As interpreted by the Supreme Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), "'[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 477. In searching the entire record for substantial evidence, a reviewing court "must take into account whatever in the record fairly detracts" from the ITA's fact finding as well as evidence that supports it. *Id.* at 487–88. The court may not substitute its judgment for that of the ITA when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Id.* at 488. However, it is appropriate to set aside the ITA's decision when the court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to [its] view." *Id.*

Diversified alleges that the ITA misconstrued the scope of the original dumping investigation and improperly expanded its coverage to include speedometers other than those chiefly used on bicycles. In determining whether specific merchandise is included within the scope of a dumping finding, this court has provided the following general guidelines:

> Each stage of the statutory proceeding maintains the scope passed on from the previous stage.* * *
>
> In those administrative proceedings even if plaintiff believed itself to be an "orange" among "apples", so long as the Department of Commerce and the ITC were considering it to belong to a certain class it remained so for the purpose of the proceedings.

Royal Business Machines, 1 CIT at 87, 507 F. Supp. at 1013 (footnote omitted).[5] In this connection, the administrative record compiled by the ITA during its section 751 review is replete with evidence showing that the class or kind of merchandise which was examined during the initial dumping investigation included speedometers used on bicycles as well as on exercise machines. The record shows that both the Treasury Department and the Tariff Commission investigated and determined that there was dumping of speedometers of a class or kind used on bicycle *and* exercise machines.

As for Treasury, it is true that when it published its notice of dumping finding in 1972, Treasury described the subject merchandise simply as "bicycle speedometers from Japan." *See* 37 Fed. Reg. 24,826. However, in 1972 Customs was in fact classifying speedometers intended for use on exercise machines as bicycle speedometers. Moreover, the record of the Tariff Commission's injury investigation shows that speedometers used on exercise machines were included in that investigation. For example, the Commission's questionnaire to domestic manufacturers defined "bicycle speedometer" as "an instrument attached to a bicycle or exercise machine." In addition, the staff report to the Commission described a bicycle speedometer "as an accessory type instrument that is attached to a non-motorized bicycle and to an exercise machine."

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[5] Since the language of the relevant sections of the former and current antidumping laws track nearly verbatim, this court's statements in *Royal Business Machines* are equally applicable to the scope of the 1972 dumping finding. *See Matsushita Electric Industrial Co.* v. *United States,* 2 CIT 263, 264 n.3, 529 F. Supp. 670, 671 n.3 (1981).

Diversified's assertion to the contrary notwithstanding, the record does not suggest that either Treasury or the Commission restricted the scope of "bicycle speedometers" to speedometers chiefly used on bicycles. The fact that Customs does not presently classify double-gear hub drive speedometers as bicycle speedometers because they are not chiefly used on bicycles is immaterial. *See Royal Business Machines,* 1 CIT at 87 n.18, 507 F. Supp. at 1014 n.18. There is no question that the class or kind of merchandise initially investigated by the government included *all* bicycle-type speedometers. Thus, in its notice of final results the ITA correctly found that the scope of the earlier dumping investigation covered speedometers used on both bicycles and exercise machines.

In addition to this finding; inasmuch as double-gear hub drive speedometers had not yet been developed at the time of the 1972 dumping investigation, the ITA went on to determine whether these speedometers belong to the class or kind of merchandise encompassed in the 1972 finding, employing the following criteria: the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels of trade in which the merchandise moves, the ultimate use of the merchandise, and cost. *See, e.g., United States* v. *The Carborundum Company,* 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, *cert. denied,* 429 U.S. 979 (1976); *B. & K. Instruments, Inc.* v. *United States,* 82 Cust. Ct. 219, 227, C.D. 4803 (1979).

Applying the first of these criteria, the general physical characteristics of the single-gear and double-gear speedometers are virtually identical, any differences in this respect being *de minimis.* One difference is that the latter has an additional "idler" gear which enables it to be mounted on either side of a wheel and still function. Despite this difference, the ITA found and the record reflects that single-gear and double-gear hub drive speedometers have the identical end use: to measure speed and distance on either bicycles or exercise machines. Thus, the ultimate use of the merchandise is the same for both single- and double-gear speedometers. Moreover, it is undisputed that both kinds of speedometers are in fact used on exercise machines by the ultimate purchaser. When this fact is coupled with the identity of purpose of these speedometers, the expectation of purchasers of either type of speedometer is the same.

Record support also exists for the ITA's finding that double-gear hub drive speedometers are marketed at wholesale in the same channels of trade as single-gear speedometers. Both types of speedometers are sold by wholesale distributors in kit form to original equipment manufacturers of bicycles and exercise machines.

The last factor which the ITA considered in its review was cost. Here, the record reflects a cost difference of approximately 11 cents between single- and double-gear hub drive speedometers. The ITA found and the court agrees that this is an insignificant cost difference, considering a U.S. price of approximately $4.50 per unit.

All in all, the court finds substantial evidence on the record viewed as a whole to support the ITA's conclusion that double-gear hub drive speedometers are of the same class or kind of merchandise which was the focus of the 1972 dumping finding.

The court turns finally to the question of the appropriate amount of cash deposits to be imposed on the merchandise.

V

Antidumping Duty Deposits

Diversified challenges the ITA's decision to require cash deposits of 25.98%—the highest rate assessed against a responding firm under the section 751 review. Having reconsidered its decision, the ITA now concedes that it applied an incorrect rate. It has, for that reason, requested a remand in order to adjust the deposit rate to a percentage derived from the weighted average rate computed for all responding firms.

Diversified counters that inasmuch as the ITA never computed a dumping margin for double-gear hub drive speedometers of Diversified's primary Japanese supplier, no estimated cash deposits may be required of it.[6] Diversified's position, however, is based on a misapprehension of the law. Section 736(a)(3) of the Trade Agreements Act of 1979, 19 U.S.C. § 1673e(a)(3), provides in part that the ITA shall publish an antidumping order which requires the deposit of *estimated* antidumping duties pending the liquidation of entries. Those duty deposits are estimates only and are adjusted at the time of liquidation in accordance with 19 U.S.C. § 1673f. There is no statutory support for Diversified's theory that if there is insufficient data available to assess absolutely accurate amounts for such duty deposits that they may not be required until the next section 751 review.

Under the circumstances presented here the court is of the view that imposition of estimated duty deposits based on the weighted average rate is proper.

VI

Conclusion

For all the foregoing reasons, Diversified's motion for judgment on the administrative record is denied, and the ITA's cross-motion is granted. This case is remanded to the ITA with directions to redetermine the amount of estimated antidumping duty deposits in a manner consistent herewith.

HERBERT N. MALETZ,
Senior Judge.

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[6] Intervenor has taken the position that the ITA was initially correct.

571 F. Supp. 1265

Bethlehem Steel Corporation, plaintiff v. United States, defendant

Court No. 83-1-00026

Memorandum Opinion and Order of Dismissal

1. Affirmative and negative determination contained in a final determination of the ITA are severable for the purpose of seeking judicial review thereof in this court.

2. In a challenge to the sufficiency of the finding upon which a final negative determination of the ITA is based, this court lacks jurisdiction of the subject matter when the action is not commenced by the filing of a summons within thirty days after the date of publication of the final determination by the ITA in the Federal Register. 19 U.S.C. § 1516a(a)(2) (A)(i) and (B)(ii).

[Action dismissed for lack of jurisdiction of the subject matter.]

(Dated September 29, 1983)

Eugene L. Stewart, Terence P. Stewart and *Paul W. Jameson (Curtis H. Barnette, Meredith Hemphill, Jr., Laird D. Patterson* and *Roger W. Robinson* on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General *(David M. Cohen,* Director, Commercial Litigation Branch and *Francis J. Sailer* on the brief) for the defendant.

Boe, *Judge:* On November 15, 1982, the International Trade Administration, Department of Commerce (ITA), published its final determination in the investigation of certain steel products from Spain. 47 Fed. Reg. 51438–52. In its final determination the ITA found the following:

> (1) That certain programs (preferential loans, privileged export credits, etc.) constitute countervailable subsidies.
>
> (2) That the mechanism whereby Spain rebates indirect taxes paid by Spanish steel exporters, Desgravacion Fiscal a la Exportacion (DFE), does not constitute a subsidy.

The International Trade Commission (ITC) on December 21, 1982, notified the ITA as to its determination that an industry in the United States is being materially injured by reason of steel imports from Spain. 48 Fed. Reg. 525 (1983).

On January 3, 1983, the ITA published countervailing duty orders based on the final affirmative determinations contained in the final determination of the ITA published November 15, 1982. 48 Fed. Reg. 51.

On January 7, 1983, the plaintiff filed a summons and complaint in this court challenging the finding of the ITA that the Spanish DFE does not constitute a countervailable subsidy. This action is presently before this court pursuant to the procedure provided by Rule 56.1 of the United States Court of International Trade.

The defendant questions the jurisdiction of this court to entertain the instant action. In raising this issue the defendant states it is prompted by two prior decisions: *United States Steel Corp.* v. *United States,* 5 CIT 272 (1983) and *United States Steel Corp.* v. *United States,* 5 CIT 287 (1983). Contending the determination of the ITA that the Spanish DFE program does not confer a subsidy upon the exporter and, accordingly, is a negative determination under the provisions of 19 U.S.C. § 1516a(a)(2)(B)(ii), the defendant claims that the summons commencing the instant action was untimely filed.

Since the defendant took a contrary position in the *United States Steel* cases, *supra,* its jurisdictional challenge is without conviction. When a question as to jurisdiction is suggested by the parties or presented by the pleadings in an action, it is incumbent upon the court to make a determination with respect thereto. Rule 12(h)(3) of the Court of International Trade Rules.

The provisions of the Trade Agreements Act of 1979 pertinent to the issues presented in the instant action are found in 19 U.S.C. § 1516a(a)(2) (A) and (B):

> (2) Review of determinations on record.—
>
> (A) In general.—Within thirty days after the date of publication in the Federal Register of—
>
> (i) Notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or
>
> (ii) An antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B).
>
> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Customs Court by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.
>
> (B) Reviewable determinations.—The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority and by the Commission under section 1671d or 1673d of this title.
>
> (ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.

A civil action to review a final determination by the ITA is commenced in this court by the filing of a summons. Rule 3(a) of the Court of International Trade Rules. In the summons filed by the plaintiff in this court on January 7, 1983, paragraph 2 provides:

> 2. Plantiff contests the final affirmative determinations of the International Trade Administration (ITA) of the Commerce Department published on November 15, 1982 * * *. The countervailing duty order was published on January 3, 1983 (48 Fed. Reg. 51). These determinations are contested pursuant to 19 U.S.C. 1516a(a)(2)(A)(ii), 19 U.S.C. 1516a(a)(2)(B)(i) and 28 U.S.C. 1581(c).

The complaint was filed contemporaneously with the summons and likewise predicates the jurisdiction of this court under the statutory time limitations provided in 19 U.S.C. § 1516a(a)(2)(A)(ii) and (B)(i), which directs the filing of a summons within 30 days of the publication of a countervailing duty order based on the final affirmative determinations of the ITA and the ITC. Notwithstanding the specific jurisdictional allegation in its summons and complaint, the plaintiff does not challenge the countervailing duty order of the ITA nor the final *affirmative* determinations which constitute the basis for the order. On the contrary, the gravamen of plaintiff's complaint and the prayer for relief contained therein challenge *only* the findings of the ITA as to the final negative determination of November 15, 1982.

A purpose of a pleading is to provide affirmative notice as to the statutory authority from which jurisdiction of an action stems.

> The sufficiency of the jurisdictional allegation is dependent on the validity of the pleader's assertion which is determined by reference to the relevant federal statute, rather than in terms whether the claim for relief is meritorious. 5 C. Wright and A. Miller, *Federal Practice And Procedure*, § 1206 (1969).

Although plaintiff contends that in the instant action it is challenging the countervailing duty order issued by the ITA, it is noteworthy that the order itself contains no mention of the ITA determination of November 15, 1982, holding that the Spanish DFE program did not constitute a subsidy. 48 Fed. Reg. 51 (1983). To accept plaintiff's contention would require this court to hold that the finding of the ITA in its final determination that the Spanish DFE program is not a subsidy, in fact, does not constitute a *negative determination*. Such an interpretation is contrary to the express meaning of the governing statute. A determination that a particular practice in not a subsidy is a negative determination. *Republic Steel Corp.* v. *United States*, 5 CIT 272 (1982).

After careful examination of the pertinent statutes this court concludes that for judicial review purposes severability of the respective affirmative and negative determinations which may be included in a final determination of the ITA is required in order to permit compliance with express statutory language. 19 U.S.C. § 1516a(a)(2)(A) provides for the filing of a summons, commencing an action in this court, within 30 days after two specific publication dates. An interested party contesting a *countervailing duty order based on a final affirmative determination* of the ITA and ITC must commence an action within 30 days of the publication of *that* order. 19 U.S.C. § 1516a(a)(2)(A)(ii), (B)(i). On the other hand, an interested party desiring to contest any final *negative determination* by the ITA must file a summons in this court within 30 days after publication of the notice thereof in the Federal Register. 19 U.S.C. § 1516a(a)(2) (A)(i), and (B)(ii).

Two discrete time limitations for the commencement of an action in this court thus have been provided by Congress. It cannot be assumed that Congress failed to envision the possibility of a final determination by the ITA comprising both affirmative as well as negative determinations. Admittedly, compliance with the statutory language might lead to undesirable piecemeal litigation. However, it is not the province of the court to invoke a construction of a statute which it might deem preferable but contrary to the express and unambiguous words comprising it. Should it be found that judicial efficiency is impaired thereby, the correction must be made by legislative fiat.

The court is satisfied that its conclusion is consistent with legislative intent. Congress intended to "streamline and expedite the review of antidumping and countervailing duty proceedings by providing for expedited judicial review of *all* reviewable determinations." (Emphasis added). H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 181 (1979). In the case of a final affirmative determination by the ITA, Congress has indicated that judicial review should become available only after the ITC has made its determination on material injury.

> The effect of affirmative final determinations by both the Authority [ITA] and ITC will be that the Authority shall issue a countervailing duty order. However, if either of these final determinations in negative, the investigation will terminate upon publication of the negative determination. H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 56 (1979).

The congressional intent of expedited review of administrative determinations would be poorly served in judicial review of a negative determination, despite the termination of the investigation, is required by the court to await the further and additional determination of the ITC with respect to any final affirmative determinations and the issuance of a countervailing duty order. The court in *Republic Steel Corp., supra*, at 4-5, held that a preliminary determination that a particular practice is not a subsidy constitutes a negative determination:

> [T]he legislative history makes it unmistakeably clear that judicial review of these determinations was intended to reach every decision that a subsidy was not being provided—even if other subsidies were found to exist at the same time. * * * It is * * * reasonable to treat an investigation * * * into the existence of more than one subsidy * * * as resulting in a series of discrete and severable determinations, each of which resolves a

question of whether imported merchandise was receiving a subsidy.[1]

This court, like the United States District Courts, possesses only limited jurisdiction. It has been repeatedly held that all actions therein must be commenced within the defined limitation prescribed by statute. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 673 F. 2d 1254 (1982); *Kalpake* v. *Ribicoff*, 202 F. Supp. 495 (N.D. Ill. 1961); and *Le Mieux Bros. Inc* v. *Tremont Lumber Co.*, 140 F. 2d 387 (5th Cir. 1944). In the judicial review of administrative determinations, the courts have consistently held that the right of action against the United States is limited by the provisions of the statute which creates the right.

> Where the government conditionally waives its immunity from suit, there exists no discretion in this court to nullify the conditions imposed. *Zeller* v. *Folsom,* 150 F. Supp. 615, 617 (N.D.N.Y. 1956). *See* also *White* v. *Secretary of HEW*, 56 F. R. D. 497, 499 (N. D. N. Y. 1972).
>
> To bring an action under the statute, it is necessary for plaintiff to plead that the action was brought within the specified period in order to demonstrate that the United States has consented to suit and given the court a basis for asserting jurisdiction. 5 C. Wright and A. Miller, *supra,* § 1212.

The court therefore concludes that it affirmatively appears from the summons, complaint and the record herein that the plaintiff has neither asserted facts nor statutory authority necessary to give this court a basis for assuming jurisdiction. Nor has that instant action been commenced within the time prescribed by 19 U.S.C. § 1516a(a)(2)(A)(i) and (B)(ii).

The above-entitled action, accordingly, is hereby dismissed for lack of jurisdiction of the subject matter.

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574 F. Supp. 1058

CHARLES SCRIBNER'S SONS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79-2-00276

Before RE, *Chief Judge.*

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[1] Although this court's decisions in *United States Steel Corp.* v. *United States*, 5 CIT 272, Slip Op. 83-59 (June 16, 1983) and *United States Steel Corp.* v. *United States*, 5 CIT 287, Slip Op. 83-65 (June 28, 1983) are consistent with the legislative intent and language of the statute, they are not determinative in the instant action. These cases follow the statute in extending the holding in *Republic* (as to the severability of preliminary determinations) to final determinations.

The *United States Steel* cases hold, that while challenges to final affirmative ITA determinations are premature when made prior to the ITC final determinations in the case, challenges to final negative ITA determinations may be made upon publication thereof and prior to the final ITC action thereupon.

Sierra Engagement Calendars 1979

Engagement Calendars classified under Item 256.56 of the TSUS as "[b]lank books, bound: [d]iaries, notebooks, and address books," were produced, marketed, advertised and sold specifically as calendars and as a medium in which to show high-quality nature photography. Plaintiff's claim for classification as "[c]alendars of paper: [p]rinted on paper in whole or in part by a lithographic process" is sustained. Since the primary purpose of the item was to note dates for future appointments and references, the article was a calendar within the scope of Item 274.10, and dutiable at a rate of 6¢ per lb.

[Judgment for plaintiff.]

(Dated September 30, 1983)

Weil, Gotshal and Manges (Robert F. Brodegaard and Charles H. Bayar at the trial and on the brief), for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Robert H. White* at the trial), for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Japan and described on the invoice as the "Engagement Calendar 1979." The merchandise was classified as diaries under Item 256.56 of the Tariff Schedules of the United States (TSUS), as "[b]lank books, bound: [d]iaries," and was consequently assessed with duty at the rate of 10% ad valorem.

Plaintiff protests this classification and contends that the merchandise is properly classifiable under Item 274.10, TSUS, as calendars dutiable at the rate of 6¢ per lb. Plaintiff alternatively contends that the merchandise is properly classifiable under Item 274.75, as printed matter dutiable at the rate of 6¢ per lb., or under Item 256.58, as blank books dutiable at the rate of 4% ad valorem.

The pertinent statutory provisions of the tariff schedules are as follows:

Classified by customs officials under:

256.56	Blank books, bound: Diaries, notebooks, and address books.	10% ad val.

Claimed by plaintiff under:

274.10	Calendars of paper: Printed on paper in whole or in part by a lithographic process:	

	Not over 0.020 inch in thickness.	6¢ per lb.

Alternatively claimed by plaintiff under:

274.75	Other: Printed on paper in whole or in part by a lithographic process: Not over 0.020 inch thick..........	6¢ per lb.
and		
256.58	Blank books, bound: Other	4% ad val.

The question presented is whether the imported articles are "diaries" as classified by customs, or "calendars" as claimed by plaintiff. If the imported "Engagement Calendar" is not a calendar within 274.10, then the court must determine whether it is properly classifiable as "[o]ther: [p]rinted on paper in whole or in part by a lithographic process * * *," or as "[b]lank books, bound: [o]ther."

Since the primary purpose of the merchandise is to note dates for future appointments and references, it is the determination of this court that the imported articles are properly classifiable as calendars within the scope of Item 274.10, TSUS, with a duty rate of 6¢ per lb.

At trial, plaintiff presented five witnesses who were responsible for the creation, production, marketing, advertising, purchasing and sale of the "Engagement Calendar." Their testimony reveals distinctions between diaries and calendars with respect to the kind of binding, the type of paper, use of space and the essential purpose of each. Plaintiff contends that the testimony of these witnesses, together with an examination of the article itself, establishes that the imported merchandise has been erroneously classified as diaries.

The first witness, Mr. Ian Ballantine, owner of Ballantine Books, in 1967, conceived the idea of publishing a calendar depicting carefully selected, high-quality nature photography of the Sierra Club. The original calendar, published for 1968, was a wall calendar. In 1969, however, Ballantine Books published a spiral-bound desk version called an "Engagement Calendar" with photographs on the left side and a table of the days of the week on the right side. Mr. Ballantine testified that Scribner's Sons assumed the publishing of the "Engagement Calendar" about four or five years later, and that the format of the desk calendars was never changed. The merchandise in issue in this case, which is the 1979 version of Mr. Ballantine's calendar, is entirely bound and approximately 9⅜ inches long by 6½ inches wide, and contains throughout high-quality photographs of nature scenes. Plantiff's exhibit 1, which is a representative sample of the importation, is entitled "Wilderness 1979 Sierra Club Engagement Calendar" and depicts, among others, scenes from Yosemite National Park, Grand Canyon, Rocky Mountain National Park and Boulder Mountain Park.

Mr. Ballantine, who has been in the book publishing business since 1939, defined a "calendar" as understood in the publishing business. He stated that it was "a device for keeping dates in front of one, usually there's a group of dates not one date. A place to put down a dentist's appointment." All of plaintiff's witnesses agreed with this definition. Mr. Ballantine also testified that, from the outset, the "Engagement Calendar" was created, published and marketed on a nationwide scale as a calendar, and, in his opinion, could never be considered a diary. He noted that among the physical characteristics which distinguish the merchandise from a diary was the quality of paper, which he stated, was not suited to a large amount of writing. The paper was used to achieve better results in photographic reproduction and contained unlined space allotted to each day of the week, approximately one inch by $14\frac{13}{16}$ inches, which does not allow for lengthy notations typical of diary use.

Mrs. Monica Brown Lamontagne, vice-president of art and production at Scribner's Sons since 1978, testified that the intention of the designers of the calendar was to provide a useful desk calendar, and to have a medium in which to show photographs they thought were exemplary. As a result, approximately 90% of the time, effort and expense in producing the calendar was devoted to the photographs and their reproduction, the quality of which, in her opinion has been responsible for its success. She also testified that although Scribner's Sons had received numerous complaints about the titanium-coated paper, they chose not to change the paper since it was best suited for their primary interest—the promotion of the Sierra Club photographs.

Mr. Franklin L. Rodgers, President and chief operating officer of the plaintiff, testified that all those involved in the negotiations, by which plaintiff obtained publishing rights to the "Engagement Calendar," recognized it as a calendar and not as a diary. Mr. Rodgers also testified that the desk calendar version has been marketed throughout the country as a calendar because it was not suitable as a diary. He added that the merchandise was unlike diaries because it was not bound like a regular book, and noted that the spiral binding was not permanent. In Mr. Rodger's view, a diary would be expected to have a more permanent type of binding which could be labelled and shelved for future reference.

Mr. Spencer Gale, a buyer for Doubleday Bookstores, testified that he purchased the imported merchandise as calendars, and that they are sold to his customers primarily to note events that will happen in the future. According to Mr. Gale, the purpose of the imported merchandise is to "organize your schedule," and is unsuitable for use in making a daily record of personal reflections or feelings.

Plaintiff contends that the evidence presented at trial has completely rebutted the presumption of correctness which attaches to the Government's classification. 28 U.S.C. § 2639(a)(1)(1976). Plaintiff further contends that the calendar classification, Item 274.10 of Part 5, TSUS, is a more specific classification than Item 256.56 of Part 4, TSUS, and therefore the merchandise should not be classified as a diary since under headnote (1)(ii) of Part 4, Schedule 2, any article that can be classified under Part 5 is excluded from Part 4. In support of this contention plaintiff cites General Interpretative Rule 10(c) which provides that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it * * *." Plaintiff also contends, in the alternative, that even if the court finds Item 274.10 inapplicable, a more suitable classification still exists, depending upon whether the merchandise is found to be essentially "textual or pictorial matter," or "concerning paper, paperboard and products thereof." If the former, the proper classification would be under Part 5, in Item 274.75, as [o]ther: [p]rinted on paper in whole or in part by a lithographic process * * *." If the latter, the merchandise would fall under Part 4, in Item 256.58, as [b]lank books, bound: [o]ther."

Plaintiff contends that the most specific classification of the merchandise is that of calandars. It submits that the essential purpose and physical characteristics of the imported merchandise, together with the testimony of the witnesses, clearly establish the proper classification under Item 274.10, as calendars.

The defendant maintains that the merchandise was properly classified since it comes within the judicially determined meaning of the tariff term "diary." At the trial, it presented the definition of "diary" from Webster's *Third New International Dictionary of the English Language* (1961) as: "a register or record of events, transactions or observations kept daily or at frequent intervals or a daily record of personal activities, reflections of feelings."

Defendant also maintains that the decision in *Brooks Brothers, Div. of Julius Garfinckel & Co., Inc.* v. *United States,* 68 Cust. Ct. 91, C.D. 4342 (1972), controls the present case since it determined that a spiral bound book, measuring eight inches by ten inches, with blank pages for recording events and appointments, constituted a diary because it conformed to the lexicographical definitions of a diary. In addition, defendant cites *Fred Baumgarten* v. *United States,* 49 Cust. Ct. 275, Abs. 67150 (1962), where the court noted that "the particular and distinguishing feature of a diary is its suitability for the receipt of daily notations," *Id.* at 276, stating that the "Engagement Calendar" contains ample space to make daily notations.

Aside from the alloted space for each day, defendant asserts that one can make notations on the blank areas under approximately one-third of the photos, as well as the entirely blank page labelled "notes" at the end of the "Engagement Calendar." Since plaintiff did not offer evidence to contradict this fact, defendant submits that the original classification is correct. It also asserts that the primary use of the merchandise is crucial, and that the essential character of the merchandise evolves from the blank spaces which permit daily notations. It contends that since the merchandise is primarily used for completing the blank spaces in the "Engagement Calendar," classification under Item 256.56 should be sustained.

It is well established that the lawful and proper classification for imported merchandise is that which "most specifically" describes it. General Interpretative Rule 10(c). To determine the most specific classification of the merchandise in this case, the court must look to its prior decisions which pertain to both diaries and calendars, and examine the available lexicographic definitions of both terms as well as the testimony given at trial.

Charles F. Sormani & Alltransport, Inc. v. *United States,* 33 Cust. Ct. 423, Abs. 58502 (1954), appears to be the only case which has specifically found imported merchandise to be a calendar for customs duty purposes. In that case the Court held that a space left for daily notations, which measured approximately three-eighths of an inch by two inches, did not render the merchandise suitable as a diary under the tariff provisions. Hence, the court sustained plaintiff's protest for classification as calendars and stated that they were "not rendered less so because space has been set aside for notations * * *." *Id.* at 424.

Two cases are illustrative of the judicial decisions which have interpreted and applied the term "diary". In the first case, *Fred Baumgarten,* 49 Cust. Ct. 275, Abs. 67150 (1962), the court determined that the merchandise was most suitable for use as a diary because it offered whole pages allocated to "spaces for hourly entries during the course of each day of the year." *Id.* at 276. the court held that the books were designed for the very purpose of recording daily events or transactions, and could not be classified as anything but diaries under Item 256.56, TSUS.

The second case, upon which the defendant relies heavily, is *Brooks Brothers, etc.,* 68 Cust. Ct. 91. C.D. 4342 (1972). In *Brooks Brothers,* based upon *Fred Baumgarten* and other precedent, the court held that merchandise, entitled the "Economist Diary," was a diary since it was produced, marketed and sold as such, notwithstanding the fact that it contained additional information which the court found did not change the essential nature of the article. While both *Fred Baumgarten* and *Brooks Brothers* establish what is a diary for customs duty purposes, they do not, however, distinguish between a diary and a calendar. Therefore, contrary to the defendant's assertion, they do not govern the result in the present case.

Since the tariff schedules are written in the language of commerce, and the terms used are to be given their "commercial" or "common" meaning, *United States* v. *Victoria Gin Co., Inc.*, 48 CCPA 33, C.A.D. 759 (1960); *Nylos Trading Co.* v. *United States*, 37 CCPA 71, C.A.D. 423 (1949), this court must examine the lexicographic sources and the testimony given at trial to determine whether the importation is a diary or a calendar.

Perhaps the most authoritative dictionary for the purpose of interpreting the tariff schedules is Webster's *Third New International Dictionary of the English Language*, since it was published contemporaneously with the promulgation of the tariff schedules. *Air-Sea Forwarders, Inc.* v. *United States*, 76 Cust. Ct. 268, C.D. 4665 (1976). In pertinent part, that dictionary defines calendar and diary respectively as follows:

> *Calendar*
>
> 1: calendar n. * * * 2(a): *a tabular register of days according to a system usu[ally] covering one year*, referring the days of each month to the days of the week. * * * 4: *an orderly list of persons, thing or events; as * * * d: a list of events or activities giving dates and details of planned events * * *; also: a list of events or the series of events scheduled for a particular period of time* * * *. [*Emphasis added.*]
>
> *Diary*
>
> 1: a register or record of events, transactions or observations kept daily or at frequent intervals: Journal: esp: *a daily record of personal activities, reflections, or feelings.* 2: a book intended for or used for a diary. [Emphasis added.]

The other authoritative dictionaries reflect the essence of Webster's version. For example, Funk & Wagnall's *New Practical Standard Dictionary of the English Language* (1963) defines the respective terms as follows:

> *Calendar*
>
> 1: *A systematic arrangement of* subdivisions of times, as *years, months, days, weeks, etc.* * * * 3: *A schedule* or list *of things or events* classified or *chronologically arranged*: [Emphasis added.]
>
> *Diary*
>
> 1: A record of daily events; especially *a personal record of one's activities, experiences, or observations*; a journal. 2: A book for keeping such record * * *. [Emphasis added.]

Mr. Ballentine's informal definition, with which all other witnesses agreed, that a calendar is a "device for keeping dates * * * [with a] place to put down a dentist's appointment," also comports with the definition found in Webster's dictionary. Thus, to distinguish between the two terms by way of example, a calendar is not primarily intended to be used in connection with extensive notations, but rather as a list or enumeration of persons, things or periods of time. A diary, on the other hand, is primarily intended to be used in connection with extensive notations, and is more like a chronicle or journal which records events, transactions or observations.

The merchandise in issue contains fifty-three calendar pages, each bearing the month at the top and includes seven separate blocks of space devoted to one day of the week. The space allocated to each block is miniscule, measuring approximately one-inch by 4¹³⁄₁₆ inches, and was intended for a notation of no more than a sentence or two. Although there is additional blank space under approximately one-third of the photographs, that space is not uniform, and exists only because some photographs are smaller than others. Thus, that space was obviously not intended to be used primarily for extensive notations.

Witnesses who are now and have been directly responsible for the design, marketing, production and sale of the "Engagement Calendar," testified emphatically that it was created, marketed and sold as a calendar, the main purpose of which was to convey Sierra Club photography. An examination of the article fully supports the testimony. The titanium-coated paper used, for example, was unlined and of a kind more suitable to highlighting the photographs rather than for writing. Both the spiral binding and graphic format further support the testimony that it was created and is purchased primarily as a calendar containing photographs and not as a diary.

Since a diary is a device "suitable for the receipt of daily notations," *Fred Baumgarten,* 49 Cust. Ct. at 276, and the "Engagement Calendar" is clearly not primarily suitable for such a purpose, "it would do violence to the essential nature of the merchandise to classify it under any provision other than the one that describes it perfectly." *Brooks Brothers,* 68 Cust. Ct. at 96.

It is the finding of this court that the testimony of the witnesses, together with an examination of the "Engagement Calendar," establishes that its essential purpose was to convey high-quality Sierra Club photography in the form of a calendar. Further, the additional space which exists in the one blank, two-sided note page, and under approximately eighteen pages of the "Engagement Calendar," clearly does not render the "Engagement Calendar" suitable for diary purposes. Since plaintiff has met its burden of proof, it is unnecessary to consider the alternative claims presented under any of the other tariff provisions.

In view of the foregoing, it is the determination of the court that the imported "Engagement Calendars" are properly classifiable under Item 274.10, TSUS, as "[c]alendars of paper: [p]rinted on paper in whole or in part by a lithographic process: [n]ot over 0.020 inch in thickness" with duty (as modified by T.D. 68–9) of 6¢ per lb.

Judgment will issue accordingly.

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND COMPANHIA SIDERURGICA PAULISTA (COSIPA), ET AL., INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Order

(Dated October 7, 1983)

WATSON, *Judge:* Upon reading and filing plaintiff U.S. Steel's motion for reconsideration of this Court's order denying in-house counsel access to confidential information in the record, defendant's response in support of plaintiff's motion, and intervenors' opposition to plaintiff's motion, and upon all other papers and proceedings herein, it is hereby

ORDERED that plaintiff's motion be, and hereby is, DENIED.

The Court notes briefly that at no time has it been under the impression that U.S. Steel is being represented by anyone other than its staff counsel. When the Court stated in Slip Opinion 83-76 (July 22, 1983) that the retention of outside counsel "remains" a reasonable way for U.S. Steel to satisfy its need for the confidential information, it meant simply that the retention of outside counsel was a reasonable alternative step for U.S. Steel to take in the further conduct of its litigation. The commendable and convenient joint filings by U.S. Steel and Republic Steel, *et al.* did not lead the Court to believe that counsel for the latter were in any way representing, or acting for, U.S. Steel.

SPEARHEAD INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-6-00780

Before FORD, *Judge.*

Halloween Costumes—Toys

Importations of Halloween costumes, consisting of inflatable caps and poncho capes to which are added, after importation, domestically produced makeup and a reflective strip, are toys under the provisions of Item 737.95, Tariff Schedules of the United States, as classified.

The principle of equitable estoppel is not applicable against the government when acting in its sovereign capacity. *Air-Sea Brokers, Inc.* v. *United States,* 66 CCPA 64, C.A.D. 1222, 594 F.2d 1008 (1979). *Bethlehem Steel Corp.* v. *United States,* CIT, Slip Op. 82-109; *United States* v. *Bar Bea Truck Leasing Co., Inc., Bar Mar Ware-*

house Co., Inc. (CAFC Appeal Nos. 82-36, 83-515), decided August 11, 1983.

The imported articles do not constitute parts under the principles enunciated by *United States* v. *Willoughby Camera Stores Inc.*, 21 CCPA 332, T.D. 46851 (1933) or *United States* v. *Antonio Pompeo*, 43 CCPA 9, C.A.D. 602 (1955) both of which are reviewed.

[Judgment for defendant.]

(Decided October 7, 1983)

Faegre & Benson (*James B. Loken* and *Randy M. Lebedoff*, at the trial and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Madeline B. Kuflik*, trial attorney), for the defendant.

FORD, *Judge:* The question presented in this action pertains to the proper classification, for customs duty purposes, of inflatable air caps and poncho capes used by children on Halloween. The merchandise was classified as "Toys * * * not specially provided for: Other: Other" under the provisions of item 737.95, Tariff Schedules of the United States, as modified by T.D. 68/9 and assessed with duty at 17.5% ad valorem or 16.8% ad valorem, depending upon the date of entry.

Plaintiff contends the imported merchandise constitutes "parts of toys" under said item 737.95, and not toys or unfinished toys. Under this theory it is the position of plaintiff that its claims, which are specific provisions, would prevail over the classification by virtue of General Interpretative Rule 10(ij). This rule provides that a "part" does not prevail over a specific provision for said part. The provisions claimed to be specific by plaintiff are item A703.72, TSUS, as modified *supra*, for the caps, and item 772.30, TSUS, as modified *supra*, for the capes. Since the merchandise is from a beneficiary nation, under the provisions of the General System of Preferences (GSP), plaintiff contends the caps are entitled to entry free of duty while the capes are dutiable at 12.5% ad valorem. Alternatively plaintiff contends the principle of equitable estoppel should be applied to the Customs Service to prevent the changing of the classification set forth in writing on March 20, 1979. In any event plaintiff alleges the changes were arbitrary and capricious within the meaning of the Administrative Procedures Act, 5 USC 706.

The pertinent provisions of the statutes involved read as follows:

> Toys, and parts of toys, not specially provided for:
>
> * * * * * * *

Other:

* * * * * * *

737.95 Other

* * * * * * *

Headwear, of rubber or plastics:

* * * * * * *

A703.72 Other

* * * * * * *

772.30 Wearing apparel (including rainwear) not specially provided for, of rubber or plastics

* * * * * * *

SCHEDULE 7, PART 5, SUBPART E, HEADNOTE 2

2. For the purposes of the tariff schedules, a *"toy"* is any article chiefly used for the amusement of children or adults.

GENERAL HEADNOTES AND RULES OF INTERPRETATION

10(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

10(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

19 CFR:

§ 177.1 General ruling practice and definitions.

(a) *The issuance of rulings generally*—(a) *Prospective transactions.* It is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation. For this reason, the Headquarters Office of the United States Customs Service will give full and careful consideration to written re-

> quests from importers or other interested parties for rulings or information setting forth, with respect to a specifically described Customs transaction, a definitive interpretation of applicable law, or other appropriate information * * *
>
> * * * * * * *
>
> (b) *Oral advice* * * * Oral opinions or advice of Customs Service personnel are not binding on the Customs Service * * *
>
> * * * * * * *
>
> (d) *Definitions* (1) A "ruling" is a written statement issued by the Headquarters Office that interprets and applies the provisions of the Customs and related laws to a specific set of facts * * *
>
> * * * * * * *
>
> (6) The term "Headquarters Office" as used herein, means the Office of Regulations and Rulings at Headquarters, United States Customs Service, Washington, D.C.
>
> **§ 177.2 Submission of ruling requests.**
>
> * * * * * * *
>
> (d) Requests for immediate consideration. The Headquarters Office will normally process requests for rulings in the order they are received and as expeditiously as possible. However, a request that a particular matter be given consideration ahead of its regular order, if made in writing at the time the request is submitted or subsequent thereto, and showing a clear need for such treatment, will be given consideration as the particular circumstances warrant and permit * * * upon request and where a clear need is shown for such action, a collect telephone call will be made to advise that the ruling letter has been issued and is being mailed.

The record consists of the testimony of six witnesses called on behalf of plaintiff and the receipt in evidence of thirty-two exhibits. Defendant offered the testimony of three witnesses and had received in evidence twenty-two exhibits. A substantial portion of the testimony and exhibits relate to the alternative claim for plaintiff concerning the principle of equitable estoppel.

The balance of the record relates to the use of the imported headwear and cape. The makeup and reflective strips are of domestic manufacture and are not in controversy. The complete product, imported and domestic, was always sold as a unit. The inflatable headdress, which has a humorous character on the inflatable portion, is positioned above the wearer's head by means of a vinyl bonnet. Waterbased makeup which is coordinated with the costume is applied to the child's face to make it appear as the character's neck. The makeup does not hide the child's face nor create a character. Based upon the record the makeup supplied with the costume, due to the small quantity provided, would ordinarily be used only once, while the costume is advertised as reusable. In the event the full container of makeup was not used, the record establishes it would be dried out by the following Halloween. A strip of reflective tape attaches to the rear of the costume to increase the wearer's visibility at night. The poncho cape is worn to complete the costume. The costumes were designed for sale by mass merchandisers during the Halloween season.

The poncho cape was designed to complete the costume and, as Exhibit 1 indicates, "[f]its easily over coats with complete freedom." The headpiece provides amusement to the wearer, and, according to plaintiff's witness Dr. Wallinga and defendant's witness Beige, a child wearing the headpiece without the makeup would be amused.

Plaintiff's alternative claim relating to the principle of equitable estoppel cannot be sustained inasmuch as it is not applicable against the government when acting in its sovereign capacity. The collection of customs duty falls within this category. *Air-Sea Brokers, Inc.* v. *United States,* 66 CCPA 64, C.A.D. 1222, 594 F.2d 1008 (1979). *Bethelhem Steel Corp.* v. *United States,* 4 CIT 229, 551 F. Supp. 1148 (1982); *United States* v. *Bar Bea Truck Leasing Co., Bar Mar Warehouse Co.,* Nos. 82-36, 83-515 (Fed. Cir. August 11, 1983).

The question of whether the change in ruling of the classification was arbitrary and capricious under 5 USC 706 likewise cannot be sustained. It is evident from Exhibit 9 that the opinion expressed therein and upon which plaintiff is relying is not a binding one. This is obvious from the following language, contained as part of Exhibit 9.

The title reads:

TARIFF CLASSIFICATION AND RATE OF DUTY (NOT BINDING)

At the bottom of the form in capital letters is the following:

THE OPINIONS EXPRESSED IN THIS REPLY WITH RESPECT TO THE DUTIES ON THE SCHEDULE DESCRIBED ABOVE ARE NOT BINDING

This is followed up with directions as to how a binding determination may be obtained, which read as follows:

> If you need a binding classification as to the dutiable status of the merchandise you intend to export to, or import into, the United States, write the Commissioner of Customs, Washington, D.C. 20229. * * *

In addition to the ruling not being binding, it is also evident that the ruling from the Customs Information Exchange in New York was not a voluntary request for information, but one which is required by the Customs Manual in order to assess customs duty throughout the United States. Such ruling, which changed the original nonbinding ruling is not arbitrary or capricious within the meaning of 5 U.S.C. 706 since Customs was merely following its own procedures. Under these procedures a first importation requires the commodity specialist to submit a request to the Customs Information Exchange on Customs Form 6431 for a report to the National Import Specialist. Exhibit 34 is said request and report which indicates a sample was sent with the request. Plaintiff urges that the rulng by the National Import Specialist is arbitrary in view of the fact that only the imported articles, and not the makeup and reflective strip, were submitted to him. It is axiomatic in this field of jurisprudence that merchandise is dutiable in its condition as imported. The imported articles were all that were necessary to submit for a ruling from the National Import Specialist. *United States* v. *Baker Perkins Inc.*, 46 CCPA 128, C.A.D. 714 (1959). *Carrington Co.* v. *United States*, 61 CCPA 77, C.A.D. 1126, 496 F.2d 902 (1974).

Insofar as the classification is concerned, since plaintiff contends the imported articles are parts of toys and the classification was as toys, there is no dispute that said merchandise falls within the definition of a toy as found in Headnote 2, Subpart E, Schedule 7. In any event the classification is presumed to be correct under 28 U.S.C. 2639(a)(1), as well as case law. This presumption stands unless plaintiff overcomes it by establishing the classification to be incorrect and to affirmatively establish a correct classification. Plaintiff has not met the dual burden of proof.

In view of the fact that the imported articles fall within the definition of a toy, the issue is narrowed with respect to the proper classification. It is the position of plaintiff as indicated *supra* that the imported articles are parts of toys and not toys *per se* or unfinished toys. By virtue of General Interpretative Rule 10(ij) such classification cannot prevail over a specific classification. Plaintiff claims that Headwear of Rubber or Plastic * * * other, and Wearing Apparel (Including Rainwear) N.S.P.F. of Rubber or Plastics, as set forth in items A703.72 and 772.30 *supra*, are specific provisions which prevail over parts of toys.

The Court will first consider the issue of whether the imported merchandise constitutes parts of toys. The question as to what constitutes a part for tariff purposes has given rise to much litigation. From this litigation there have developed two lines of cases on the subject. The first line of cases was brought about by *United States* v. *Willoughby Camera Stores Inc.*, 21 CCPA 332, T.D. 46851 (1933). In order to be a part under the *Willoughby* case, the article must be an integral, constituent or component part, without which the article to which it is joined could not function as such article. The other line of cases evolved from *United States* v. *Antonio Pompeo*, 43 CCPA 9, C.A.D. 602 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. Under either of these theories, the imported caps and capes do not, in the opinion of the Court, fall within the category of parts. The record, as well as an examination of the imported articles, establishes to the satisfaction of the Court that they are Halloween costumes. The addition of the waterbased makeup constitutes the packaging of two different toys in one box. The sale of makeup by plaintiff (Exhibit 13) for use with or without the imported costume, as well as the sale of makeup by Ideal Toy Co. (Exhibit X), establishes the above articles to be toys. The use of the reflective tape for greater visibility is highly commendable, but would not relegate the imported merchandise to be parts of toys. The imported articles are toys for tariff purposes as classified.

The claims of plaintiff are overruled, and the case is dismissed. Judgment will be entered accordingly.

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578 F. Supp. 409

United States Steel Corporation, Republic Steel Corporation, et al., plaintiffs *v.* United States of America, et al., defendants, and Companhia Siderurgica Paulista ("COSIPA") and Usinas Siderurgicas de Minas Gerais ("USIMINAS"), defendants-intervenors

Court No. 82-10-01361

Before Watson, *Judge.*

State Secrets

The Court denies the federal defendants' motion for a protective order. The information sought to be protected is found not to be entitled to the state secrets privilege against disclosure.

[Defendants' motion Denied.]

(Decided October 11, 1983)

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch *(Francis J. Sailer,* attorney, Commercial Litigation Branch) for the federal defendants.

Law Department of United States Steel Corporation (D.B. King of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (Joseph R. Sahid of counsel) for plaintiffs, Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

Watson, *Judge:* By motion under Rule 26(c) [1] of the Rules of this Court, the federal defendants seek a protective order barring disclo-

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[1] Rule 26 * * *

(c) *Protective Orders.* Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, delay or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one

Continued

sure to plaintiffs of certain portions of the administrative record on the ground that they contain state secrets. The documents involved were submitted by the Government of Brazil [2] (Brazil) and the International Bank for Reconstruction and Development [3] (World Bank), an international agency, to the United States Department of Commerce, International Trade Administration (ITA) during the ITA's countervailing duty investigation of carbon steel plate from Brazil. Some of the documents submitted by Brazil originally came from the World Bank.[4] The claim of privilege for state secrets is not made for those portions of the documents which have been made public.

The federal defendants maintain that, without the protective order, relations between the United States and Brazil would be impaired since the information was provided by the Brazilian government with the expectation that it would be held in confidence. It is also argued that because the documents supplied by the World Bank were classified confidential by that entity, release of the information would impair the United States' future relations with the World Bank.

Defendants also allege that the documents have been properly classified as confidential pursuant to Executive Order 12356.[5] Additionally, defendants have submitted an affidavit in support of their motion from Secretary of Commerce Malcolm Baldrige, wherein he asserts a formal claim of state secrets privilege based on his opinion that disclosure of this information "would have a serious adverse effect on our bilateral foreign relations with Brazil and/or our relations with the World Bank and thereby reasonably be expected to cause damage to the national security.[6]

Plaintiffs oppose the motion on the ground, among others, that the defendants have failed to demonstrate that this material consists of state secrets. On this ground, the Court denies the motion for a protective order which would completely bar disclosure.

It is for this Court to determine whether the states secrets privilege applies. *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). Classification of the documents by the government does not immunize them from the Court's exercise of judgment on this point *American Civil Liberties Union* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980)

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present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may on such terms and conditions as are just, order that any party or person provide or permit discovery.

[2] Administrative Record (AR) pages 4066–67; 4248–95; 5516–79; and 5732–5868.

[3] AR 5580–5638.

[4] AR 5516–79 and 5732–5868.

[5] 47 Fed. Reg. 14874, *et seq.* That order prescribes a uniform system for classifying, declassifying and safeguarding "national security information."

[6] The Court must express some doubt as to whether the Secretary of Commerce is the proper official to evaluate the effect of these matters on national security from the perspective of international relations. Nevertheless, it is the lack of substance in demonstrating an effect on national security which detracts from the affidavit. In this regard, an affidavit of the Secretary of State, couched in the same terms, would have been no better.

(en banc). Moreover, aside from its normal powers as a federal court, expressed in 28 U.S.C. § 1585, this Court in 19 U.S.C. § 1516a(b)(2)(B), has been specifically empowered to examine confidential or privileged material *in camera* and order disclosure. Furthermore, in 28 U.S.C. § 2641(b) Congress has also provided as follows:

> The Court of International Trade may order that trade secrets and commercial or financial information which is privileged and confidential, *or any information provided to the United States by any foreign government or foreign person,* may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order. [emphasis supplied]

The Court has examined this material, in order to determine whether it conforms to the understanding of state secrets as that term has been applied by the courts. The Court finds that the material does not consist of state secrets and does not achieve the status of a state secret by virtue of a request by a foreign government or international agency that it be kept confidential, or by this government's classification of it under Executive Order 12356, or by the opinion of the Secretary of Commerce that disclosure of the information to a party in this judicial review would damage international relations and reasonably be expected to damage national security. In brief, the disclosure of the information is not shown to present a possible threat to national secruity in the area of international relations.

The modern case law on the subject stems from the case of *United States* v. *Reynolds, supra*, which, in civil litigation against the government, upheld the privilege for a matter which would have threatened the exposure of military secrets, specifically electronic devices being tested on a military airplane. The privilege has extended into matters which might reveal specifics of the nation's intelligence gathering capability. *Spock* v. *United States*, 464 F. Supp. 510 (S.D.N.Y. 1978); *Halkin* v. *Helms*, 598 F.2d 1 (D.C. Cir. 1978); *American Civil Liberties Union* v. *Brown*, 609 F.2d 277, 281 (7th Cir. 1979), *vacated on other grounds*, 619 F.2d 1170 (7th Cir. 1980) *(en banc)*.

The privilege for state secrets is something also expressed in terms of injury to foreign relations. Cases actually embodying this aspect of the privilege, without military or intelligence overtones, are infrequent. The only case which actually discussed this aspect of the privilege, comparatively free of military or intelligence implications, is *Republic of China* v. *National Union Fire Insurance Co.*, 142 F. Supp. 551 (D.C. Md. 1956). That was an admiralty action brought by the United States, as the holder of a preferred mortgage, and the Republic of China, as the owner, to recover on insurance policies issued for coverage of certain ships. In January, 1950, ten days after the British Government recognized the Chinese

best copy available

Communist Government (at a time when such recognition was anathema to the United States), officers and crews of the ships located in Singapore and Hong Kong defected to the Chinese Communist regime and took control of the ships under the Chinese Communist flag. The defense which led to the state secrets assertion was the insurer's claim that the United States had failed to make the reasonable efforts to recover the vessels required by the insurance policies. The interrogatory objected to by the U.S. Government was designed to disclose memorandums of conversations between American and British officials. The conversations related to a request by the American government that the British issue an "order in council," a device which would have allowed a legal action to be commenced in the Singapore or Hong Kong courts, even though the action would in effect have impleaded a foreign sovereign state. The Court upheld the privilege asserted by the Secretary of State (claiming that disclosure would be prejudical to the foreign relations of the United States and contrary to the public interest) on the ground that the Secretary's determination was clearly justified "in view of the differences of opinion between the American and British Governments over the British recognition of Communist China and the many problems arising therefrom."

It is sufficient to say that matters relating to the question of recognition of Communist China during that period of time were matters of unusually sensitive foreign policy. There is no indication whatsoever that the material involved in this case in any way approaches that level of sensitivity.

It has been stated that national security is rarely involved in communications outside the realm of military or intelligence matters, and the Courts are the proper forums to guarantee the correct use of the state secrets privilege. *R. Berger, Executive Privilege,* 366–370 (1974). See generally, Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?* 91 Yale L.J. 570 (1982). It can be said that instances when commercial-oriented communications between governments rises to the level of posing threats to national security will be few and far between.

In point of fact, all indications are that this material is precisely the sort of information that can be expected to be gathered in these investigations. The Court's examination shows it to consist of material regarding the financial condition of two Brazilian steel companies and the question of whether they have received subsidies.

The material was supplied in connection with an investigation mandated by Congress and it forms part of the administrative record which is required to be kept and is expressly subject to judicial review. The scheme of judicial review specifically provides for the treatment of confidential or privileged information. The statutory right of judicial review given to interested parties depends on access to the administrative records, particularly where, as here, the information is, on its face, directly related to the question of whether or not subsidies were received.

In all these respects, this dispute is distinguishable from actions under the Freedom of Information Act such as *Carlisle Tire & Rubber Co.* v. *United States Customs Service,* Civ. Nos. 78–2001, 78–2002, 79–0224 (D.D.C. November 21, 1979) *aff'd.,* 663 F.2d 210 (D.C. Cir. 1980). Whatever the validity of the reliance placed in that case on the *source* of the information rather than its *content,* that approach has no place here.[7] Congress clearly anticipated that foreign governments would be the source of information gathered in these investigations and further anticipated that much of the information would be of a confidential nature.[8] The balancing of the interest of maintaining confidentiality with the need for meaningful access for litigation purposes is easily accomplished by means of judicially controlled disclosure. When appropriate, disclosure in these actions is routinely limited to counsel for the parties and then only for use in the litigation and under secure conditions. In short, there is no need to transform confidential matters into state secrets in this area of litigation. That would be a distortion of the state secrets privilege and an unjustified interference with the right of judicial review.

If the state secrets rationale of the federal defendants originates in respect for the foreign government's desire for confidentiality, it should be sufficiently satisfied by the protection for confidential information which exists in the law on both the administrative and judicial levels. If indeed the desires of the foreign government for confidentiality were to create state secrets in all cases, we would have the irony that the more pervasively a foreign government was involved in business production, or in participating in these investigations, the more power it would have to restrict petitioners' rights in a judicial review.

The potency of the state secrets privilege is such that it ought not to be granted except in cases of a palpable threat to national security just as the more exceptional powers of the executive ought not to be used except in cases of grave peril. *Halperin* v. *Kissinger,* 606 F.2d 1192, 1201 (D.C. Cir. 1979).

For these reasons defendants' motion for an order barring disclosure is Denied.

Because the Court's examination shows that all of this material, except for AR 4066–67, contains business confidential information, it will not allow disclosure to in-house counsel for U.S. Steel, for the reasons explained in Slip Opinion 83-76. The Court will also require that those counsel who are granted disclosure enter into a protective order similar to those entered into previously in connection with business confidential information.

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[7] The Court would prefer to read *Ceramica Regiomontana, S.A.* v. *United States,* 4 C.I.T. 168 (1982), as engaging in a simple weighing of need versus business confidentiality, coming out on the side of the latter. To the extent, however, that the opinion displays a less rigorous standard for establishing the existence of a state secret and accepts the *source* rather than the *content* as a determinant, this opinion must respectfully disagree. On that decision's suggestion that the state secret privilege may not be an absolute bar to disclosure to a party in this Court, this opinion must express a doubt that Congress intended this Court to have greater powers with respect to that momentous privilege than any other court.

[8] On the subject of state secrets, no meaningful distinction suggests itself between foreign governments and international agencies formed by groups of governments. Those considerations which apply to information from foreign governments must also apply to information from international agencies.

The Court has no doubt whatsoever that this material is not entitled to the privilege against disclosure of state secrets. Nevertheless, in order to demonstrate an excess of caution in dealing with a claim of this nature at a rather early stage in the development of case law in the area of international trade, the Court is willing to create an opportunity for appeal. It therefore states that this decision involves a controlling question of law with respect to which there is a substantial ground for difference of opinion. An immediate appeal from this decision may materially advance the ultimate termination of this litigation.

The effect of this decision is hereby stayed for the time allowed to make an application for appeal and, if an appeal is permitted, it is stayed pending appeal.

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573 F. Supp. 122

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Consolidated Court No. 81-7-00901

Before WATSON, *Judge.*

Motion for Rehearing Denied

(Decided October 13, 1983)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson and *J. Eric Nissley* of counsel) for the defendant-intervenor Zenith Radio Corporation.

United States International Trade Commission, Office of the General Counsel (*Michael H. Stein,* General Counsel; *Michael P. Mabile,* Assistant General Counsel; and *Jane Katherine Albrecht,* Attorney) for the defendant United States.

Weil, Gotshal & Manges (A. Paul Victor, Stuart M. Rosen, Harry M. Davidow and *David S. Friedman* of counsel) for plaintiffs Matsushita Electric Industrial Co., Ltd., Matsushita Electric Corporation of America, Panasonic Hawaii, Inc., and Panasonic Sales Company, a Division of Matsushita Electric of Puerto Rico, Inc., Victor Company of Japan, Limited and US JVC Corp.

Sharrets, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins and *Ned Marshak* of counsel) for plaintiffs Sanyo Electric Co., Ltd., Sanyo Electric Inc., and Sanyo Manufacturing Corporation.

WATSON, *Judge:* Defendant-intervenor, Zenith Radio Corporation (Zenith) has moved for rehearing of the Court's decision in *Matsushita Electric Industrial Co.* v. *United States,* 6 CIT 25 (1983). The International Trade Commission (ITC) has filed a memorandum in support of the motion for rehearing and plaintiffs have filed in opposition. The motion has given the Court cause to clarify the decision but it has not changed the Court's opinion that the correct decision is to reverse the ITC determination rather than to remand for further proceedings.

Remand has been urged for three reasons. The first is purely procedural—that the ITC did not make a separate, preliminary determination that circumstances had changed sufficiently to justify a review of its injury determination. In the Court's view, the changed circumstances determination is implicit in the very conduct of the administrative review. The text of the ITC determination also expressly recognizes the changes that had taken place in the circumstances of the U.S. television industry since the previous investigation. A remand for the purpose of now taking a foreordained procedural step would exalt form over substance and be an unfair and unjustifiable revival of the administrative process.

The second reason urged for remand is that the Court either found legal errors or developed unforeseen legal principles which, for their correction or application, normally require the agency to undertake further proceedings. The Court is of the opinion that all of its legal analyses were facets of its fundamental finding that the determination was not supported by substantial evidence.

Thus, the legal significance derived by the Court from the ITC's finding of changed circumstances related solely to the insubstantial nature of the "evidence" utilized by the ITC. The Court found that the ITC could not make use of alleged failures by the Japanese interests to satisfy burdens of proof or alleged failures by them to overcome presumptions that they would resume exports at injurious levels. These basic conclusions as to what was defective about the "evidence" relied on by the ITC did not constitute new interpretations of key legal terms or principles which might have shown that the agency was misdirecting its investigative efforts and ought to be given an opportunity to investigate again. The ITC knew perfectly well what it was looking for. Its determination that it had found a threat of injury was wrong simply because it was based on insubstantial presumptions, asserted failures to satisfy non-existent burdens, and speculations about future events.

The Court sees no comparison between this case and the propriety of remand in cases such as *F.P.C.* v. *Idaho Power Co.,* 344 U.S. 17 (1952) or *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). The ITC determination was reversed because, after a complete administrative hearing, directed at the proper statutory objectives, the determination was not supported by substantial evidence.

This leaves us with the third category of reasons urged for remand, in which it is argued that the Court guessed at the ITC's reasons, or interpreted them, or took it upon itself to resolve contradictions between findings, rather than return the matter to the ITC for clarification of ambiguities or resolution of contradictions.

Although the ITC determination was not a model of directness and precision, the Court believes that, on the whole, it was intelligible. The Court further believes that it has accurately stated and analyzed the rationale of the determination. On one point, however, the Court now recognizes that its opinion was confusing; and it takes this opportunity to clarify the analysis.

The Court accepted the premise of the ITC that the significant segment of the U.S. production facilities now owned by the Japanese (the subsidiaries) was part of the U.S. industry. When the time came for the Court to express its views on the one scenario of injury which had some conceivable support (the second scenario), its reasoning became unfocused. In the analysis, it said that the surge of 13" sets might be substantial evidence for a finding that the Japanese might supplement U.S. production of the subsidiaries in the short-term. The Court then made the fanciful point that this would be an aid, not an injury, given the fact that those whose production was being supplemented were part of the U.S. industry. The Court then indicated that the scenario of supplemental importations might be inconsistent with the earlier findings (when the subsidiaries were included in the U.S. industry) that there was no special coordination between them and the Japanese producers.

The Court has reviewed that portion of the opinion and found that it does not clearly express the Court's view of the second scenario and leaves the impression that this scenario was found to be entirely supported by evidence and had the same validity as the decision to include the subsidiaries in the U.S. industry.

In reality, the Court reasons as follows: The determination to include the subsidiaries was properly made and soundly based. It was specifically based on a finding that there was no coordination between the subsidiaries and the Japanese producers. The ITC rejected a possible alternative view of the evidence presented by Vice Commissioner Calhoun. Consequently, there is no ground for viewing that basic finding as anything less than fully supported by substantial evidence.

On the other hand, the second scenario is not supported by substantial evidence to the extent of finding coordination between the Japanese producers and the subsidiaries. The surge of 13" sets is only tentatively stated as support for a finding of coordination. Lacking a definiteness equivalent to the finding that there *was no coordination*, the initial finding of no coordination is given controlling importance by the Court. The necessity to engage in reasoning as to what would happen if subsidiaries were found to be coordinating less than fair value importations is thus eliminated, and the Court retracts that part of the opinion.

We are left with a finding, fully supported by the evidence, that there is *no* coordination between the subsidiaries and the Japanese producers, coupled with a prediction of injury which depends on coordination, but is not based on a *finding* of coordination.

In this situation, a remand is not called for to resolve a contradiction between the ITC findings because a contradiction does not exist. The first finding is clearly valid; the second prediction is not supported on the crucial fact of coordination.

It is now too late for Zenith to attack the ITC decision to include the subsidiaries in the U.S. industry. The proper time for that argument was in the original motion for review.

In sum, the Court is of the opinion that in this case remand would only serve to allow the ITC to correct a minor procedural irregularity or to allow the agency to search for evidence which it could have sought in the first proceeding, or to repair an injury finding which was defective and in conflict with another validly made determination. All of these would be improper and unfair uses of the remand technique.

For these reasons, the motion for rehearing is denied.

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573 F. Supp. 1142

Atlantic Sugar, Ltd., and Redpath Sugars, Ltd., plaintiffs *v.* United States, defendant, and Amstar Corporation, party-in-interest

Court No. 80-5-00754

Before Watson, *Judge.*

Memorandum Opinion and Order

(Dated October 14, 1983)

Rogers & Wells (Robert V. McIntyre and *George C. Smith* on the briefs) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General *(David M. Cohen,* director, Commercial Litigation Branch, *Francis J. Sailer,* Commercial Litigation Branch, on the briefs) for the defendant.

Sullivan & Cromwell and *Baker & McKenzie* for the Party-in-Interest.

Watson, *Judge:* This is the fourth decision in the course of a judicial review of a final determination made by the International Trade Commission (ITC) in an antidumping investigation. The ITC determined that the importation of refined sugar from Canada, sold at less than fair value from October 1, 1978 through March 21, 1979, was causing material injury to a regional industry in the United States.[1]

In the first judicial decision, the Court remanded the matter for reconsideration upon discovery of miscalculations in the data underlying some of the ITC's findings.[2] Subsequently, the ITC found that even with the corrected data, the aggregate profits for the domestic producers continued to decline.[3]

In the second judicial decision, the Court rejected the aggregation method utilized by the ITC in this particular investigation as an inappropriate approach to finding that injury was experienced by "the producers of all or almost all, of the production within that market" as required in a regional industry investigation. Section 771(4)(C) of the Tariff Act of 1930 (19 U.S.C. § 1677(4)(C)). At issue was whether the Canadian importations caused material injury to the Revere Sugar Corporation (Revere), which was the second largest producer, providing roughly one quarter of the production in the region. In the absence of a finding of injury to Revere, the Court noted that it would be difficult to sustain a finding of injury to the region.[4] Accordingly, the Court ordered that the ITC "determine whether the Revere Sugar Corporation suffered injury within the meaning of this statute and if not, whether there is any reason to conclude that those who *were* injured are the producers of all or almost all the production in the region." [5] This resulted in another ITC determination of injury.[6]

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[1] *Sugars and Sirups From Canada,* Inv. No. 731-TA-3, (March 6, 1980).

[2] *Atlantic Sugar, Ltd.* v. *United States,* 2 CIT 18, 519 F. Supp. 916 (1981).

[3] *Sugars and Sirups From Canada,* Inv. No. 731-TA-3 (October 5, 1981).

That determination was rejected by the Court in the third judicial decision because the ITC based its conclusions as to Revere's injury upon "an evaluation of data that was not confined to Revere's operation within the eleven-state Northeast regional limitation of this investigation." [7] The ITC included the data on Revere's plant in Chicago, which is outside the region under investigation. The matter was again "remanded to the ITC to determine whether Revere Sugar Corporation's Northeast regional operations, exclusive of the Chicago plant, suffered material injury." [8] The Court further ordered that "This determination must take into account the information on Revere's sales and profits for 1976 and 1977, unless the Commission chooses to disregard this data and gives its reasons for doing so." [9]

Once again, the Court must review the ITC's determination of injury to Revere Sugar Corporation.

The Court accepts the ITC's reasons for not utilizing the 1976 and 1977 data on Revere's predecessor-in-interest. The Court was concerned with the possibility that the absence of that data might have detracted from a complete and accurate analysis of the effect of Canadian imports. However, the significant reservations expressed by the accountants who audited the reports, including misrepresentations by management, and an inability to rely upon the corporation's internal accounting controls are a substantial basis for the agency decision to disregard the data.

In support of this latest re-determination[10] the ITC notes that it has no way to separate the Chicago plant data from the aggregate data on Revere's operations. During the investigation, the commodity-industry analyst primarily responsible for the investigation was told by the president of Revere that discrete Chicago plant data could not be readily provided. Revere's president also told the analyst that the Chicago plant was relatively minor compared to Revere's two other plants (Revere's regional operations), and that in any event, the condition of the Chicago plant was not significantly different from the Northeast region plants. Defendant argues that the aggregate data for Revere's operations is therefore the "best information available" and that, as such, it constitutes lawful and substantial support for the ITC's finding of injury to Revere under Section 776 of the Tariff Act of 1930 (19 U.S.C. § 1677e(b)).

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[4] The ITC has already determined that two other regional producers, Monitor Sugar Co. and Michigan Sugar Co., were not materially injured by the Canadian imports.

[5] *Atlantic Sugar, Ltd. v. United States*, 2 CIT 295 (1981).

[6] *Sugars and Sirups From Canada*, Inv. No. 731-TA-3 (April 26, 1982).

[7] The region consists of the states of Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont.

[8] *Atlantic Sugar, Ltd. v. United States*, 4 CIT 248, 553 F. Supp. 1055 (1982).

[9] *Id.*

[10] *Sugars and Sirups From Canada*, Inv. No. 731-TA-3 (March 22, 1983).

The defendant's position on the Chicago plant lacks the requisite substantial legal support. The most fundamental flaw with the ITC's determination lies in the nature of the data itself.

As noted previously by the Court:

> The regional industry provision, and therefore an investigation of material injury to a regional industry, is limited to producers "within such market who sell all or almost all of their production of the like product in that market." Section 771(4)(C) of the Tariff Act of 1930 (19 U.S.C. § 1677(4)(C)).
>
> Since it has already been determined that a regional industry in a separate and isolated market, with specified boundaries does exist, the ITC may not now ignore those boundaries when evaluating evidence for the purpose of determining whether the same regional industry has been materially injured. The proscription against the use of data from elsewhere is necessary to insure that the regional industry found to exist at an earlier juncture is actually the subject of the later material injury investigation.
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> *Atlantic Sugar, Ltd.* v. *United States,* 4 CIT 248, 553 F. Supp. 1055 (1982).

In addition to the statutory requirement that the investigation be confined to the region, the necessity of limiting investigative data to Revere's regional operations also flows from the logical requirements for evidence in this type of investigation.

The Chicago plant is one of only three plants operated by Revere.[11] Evidence in the record indicates that production at this plant is of sufficient quantity so that the inclusion of its statistics in the aggregate data could significantly disguise or distort the data for Revere's regional operations.

Given the inability to separate the Chicago plant data or determine its effects upon the aggregate data, it is not possible to say that the aggregate data used by the ITC is fairly and accurately representative of Revere's regional operations.

It is essential that the evidentiary predicate from which the ITC draws reasonable inferences be representative of the subject of inquiry. Inasmuch as the Revere data utilized by the ITC lacks this essential quality, all inferences made from the data regarding the

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[11] Revere's plants are located in Brooklyn, New York; Charlestown, Massachusetts; and Chicago, Illinois.

Revere regional operations, no matter how logical in the abstract, are no more than speculation or conjecture.

Defendant's protestation that the aggregate Revere data was justifiably employed as "the best information available" is without merit. First, the law only allows the agency to resort to less ideal evidence when "* * * a party or any other person *refuses or is unable to produce* information * * * or otherwise *significantly impedes* an investigation * * *." Section 776 of the Tariff Act (19 U.S.C. § 1677e(b)). (emphasis added) The uncontroverted evidence shows only that the data on Revere's regional operations was "not readily available." This degree of difficulty cannot be said to rise to the level of a refusal or inability to provide the requested information or a significant impediment, particularly given the critical importance of regional data to a regional investigation. If the Court were to strain and allow such a construction, it would be rendering meaningless the ITC's obligation to conduct an accurate investigation within the region. *See Budd Co.* v. *United States,* 1 CIT 67, 507 F. Supp. 997 (1980). Second, even if Revere was unable or unwilling to provide the regional data, the information used by the ITC still does not constitute proper evidence. It is not simply weaker evidence substituted for stronger evidence. It is irrelevant and immaterial data substituting for evidence. Its usefulness has been completely destroyed by the inclusion of the Chicago plant.

The Court also has other reservations concerning the use of the aggregate Revere data. The assertion by Revere's president that the Chicago data was not readily available lacks plausibility, because it is reasonable to expect that a large corporation such as Revere would maintain records of the separate operations of its plants. In addition, since a regional industry with a separate and distinct character was determined to exist,[12] it is reasonable to expect that data reflecting this separation would be readily ascertainable from those who are producers in the region. The claim that the size of the Chicago plant was relatively minor is refuted by evidence in the record. Finally, the assertion that the condition of the Chicago operation was similar to the condition of the regional operations depends on precisely the kind of separate data that Revere's president said was not readily available.

Given these reasons, the data relied upon by the ITC in making its determination that Canadian refined sugar imports materially injured Revere Sugar Corporation's Northeast regional operations is wholly unsuitable as substantial legal support for the ITC's findings. As a result of the lack of support for a finding of injury to Revere, the Court cannot sustain the ITC's determination of injury to "the producers of all or almost all of the production within that market." Section 771(4)(C) of the Tariff Act (19 U.S.C. § 1677(4)(C)). The removal of Revere from the group of producers injured dramatically reduces the injury to the region to a level clearly below the amount required to sustain a regional injury determination. With the percentage of regional production adversely affected by Canadian imports now reduced to less than three quarters of regional production, it can no longer be said that injury is being done to the producers of all or almost all of the production in that market. The pervasiveness of injury which the Court believes is necessary to a finding of injury within a region is lacking.

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[12] *Atlantic Sugar, Ltd.* v. *United States,* 2 CIT 295 (1981).

Accordingly, it is hereby

ORDERED that the final injury determination and the resultant antidumping duty order are vacated.

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585 F. Supp. 636

BETHLEHEM STEEL CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-10-01369

Before WATSON, *Judge.*

Memorandum Opinion and Order on Motion for Access to Confidential Business Information

The Court grants access to business confidential information to plaintiff's retained counsel but denies access to plaintiff's corporate counsel.

[Motion for access denied in part and granted in part]

(Decided October 18, 1983)

Law Offices of Eugene L. Stewart (*Eugene L. Stewart, Terence P. Stewart* and *Paul W. Jameson*) and Law Department, Bethlehem Steel Corp. (*Custis H. Barnette,* General Counsel; *Meredith Hemphill, Jr.,* Assistant General Counsel; *Laird D. Patterson,* General Attorney; and *Roger W. Robinson,* General Attorney) for plaintiff Bethlehem Steel Corp.

J. Paul McGrath, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch (*Francis J. Sailer,* Attorney, Commercial Litigation Branch) for the United States.

Busby, Rehm and Leonard, P.C. (*Larry E. Klayman* of counsel) for defendant-intervenor Highveld.

Office of the General Counsel, U.S. International Trade Commission (*Michael H. Stein,* General Counsel; *Michael P. Mabile,* Assistant General Counsel; *Warren H. Maruyama,* Attorney) for *amicus curiae* U.S. International Trade Commission.

WATSON, *Judge:* Plaintiff Bethlehem Steel Corporation has moved for access to confidential business information in the administrative record which is under judicial review in this action.[1] Access is sought for plaintiff's retained counsel as well as for corporate counsel. Defendant-Intervenor Highveld Steel and Vanadium Corporation Limited (Highveld) has filed in opposition to access to business confidential documents which relate to Highveld. The federal defendant has filed in opposition to access for Bethlehem's corporate counsel but has no objection to access by retained counsel. The Court has examined the material *in camera* and concludes that, on terms which insure its security, it ought to be accessible in its entirety to Bethlehem's retained counsel. The material consists of business confidential information regarding the business of two South African steel producers, all of which relates to the decisions being challenged in this action. The material is necessary for the proper prosecution of the action by plaintiff.

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[1] In deciding this motion, the Court has reviewed and incorporated the relevant material from *Bethlehem Steel Corp., et al. v. United States,* Consol. Court No. 82-3-00288, specifically the briefs of the parties and *amicus curiae,* Corporate Counsel, and the transcript of oral argument held therein.

The additional increment of benefit which plaintiff might receive from the participation of its corporate counsel is not sufficient to overcome the Court's perception of the dangers of inadvertent disclosure by corporate counsel. The reasoning of the Court in *U.S. Steel Corp.* v. *United States,* 6 CIT 55 (1983) applies here *a fortiori.* Where plaintiff is represented by expert and distinguished retained counsel, there is no justification for increasing the calamitous possibility of inadvertent disclosure by disclosing such potent competitive secrets to corporate counsel.

The Court notes that its evaluation of the risk of inadvertent disclosure is based entirely on the fact that corporate counsel are generally working more completely within the corporate environment and sustained, conscious compartmentalization of this potent and memorable information will be markedly more difficult for them than for retained counsel. The probity and integrity of corporate counsel is not questioned by the Court.

For these reasons, plaintiff's motion for access is DENIED with respect to corporate counsel and Granted for the documents listed on the attached Appendix A with respect to Eugene L. Stewart, Terence P. Stewart, Paul W. Jameson, and Kathleen T. Weaver, of the Law Offices of Eugene L. Stewart, subject to the following terms and conditions:

1. The above-named attorneys will treat the information contained in the requested documents (hereafter "confidential information") as confidential to the extent such information is not otherwise available in the public portion of the administrative record.

2. Within five days from the date of entry of this order, defendants will make available to the above-named attorneys, at the offices of the International Trade Administration of the Department of Commerce, for copying or examination, a copy of each of the documents listed in Exhibit A in its entirety, marked "Confidential," subject to the following terms and conditions:

a. All information not otherwise available in the public portion of the administrative record shall be considered as confidential;

b. The above-named attorneys (hereafter "attorneys") shall not disclose the information to anyone (including any officer, shareholder, director, or employee of the plaintiff in this matter) other than their *immediate* office personnel actively assisting in this litigation or in administrative proceedings resulting from an order of this Court, in this litigation, remanding this matter to the administrative agency;

c. The attorneys shall cause all office personnel authorized to see the confidential information to sign a statement of acknowledgment that the information is confidential and that such information will not be disclosed to anyone other than other authorized personnel at the Law Offices of Eugene L. Stewart.

d. Should counsel for Bethlehem consider the services of an expert necessary to the preparation of their case in this litigation, and the expert's services require the use of confidential information, the attorneys shall, prior to providing confidential information to an expert, notify counsel for defendants of their desire to retain an expert and shall provide counsel for defendants with: (1) the *curriculum vitae* of the proposed expert; (2) a description of the measures for safeguarding the confidential information to be made available to the proposed expert; (3) assurances that the proposed expert will provide the parties and the Court with a statement that he/she consents to be bound to the terms of this protective order; and (4) a certification that the proposed expert is independent of the steel industry. No later than ten days from the date of receipt of the above-described information, defendants shall either consent to the use of the expert proposed by counsel for Bethlehem or indicate their objections in writing. If the parties are unable to agree upon an acceptable expert within ten days, counsel for Bethlehem may file an appropriate motion with the Court.

e. The attorneys shall not make more than five (5) copies of any document that is deemed "Confidential" pursuant to this stipulation. A record of each copy made, and for whom it is made, shall be maintained.

f. Whenever any document subject to the protective order is not being used, it shall be stored in a locked valut, safe, or other suitable container, in a designated location at the Law Offices of Eugene L. Stewart.

g. The attorneys and their immediate office personnel (as described in 2(b)) shall neither disclose nor use any of the confidential information for purposes other than this litigation or in administrative proceedings resulting from an order of this Court, in this litigation, remanding this matter to the administrative agency.

h. Any document, including briefs and memoranda, which is filed with the Court in this civil action and which contains any of the confidential information shall be conspicuously marked as containing information that is not to be disclosed to the public, and arrangements shall be made with the Clerk of this Court to retain such documents under seal, permitting access only to the Court, Court personnel authorized by the Court to have access, and counsel for the parties who are signatories to this stipulation. The party filing any document referred to in this paragraph shall also file at the same time another copy of such document from which all of the confidential information shall have been deleted.

i. Any briefs or memoranda containing confidential information shall be served in a wrapper conspicuously marked on the front "Confidential—to be opened only by (the names of the attorneys handling the case)" and shall be accompanied by a separate copy from which the confidential information shall have been deleted.

j. If it should become necessary to introduce in evidence any documents containing the confidential information, counsel for the respective parties shall propose whatever mechanism may be available and appropriate to limit publication of the documents to an extent no wider than is necessary for purposes of this litigation.

k. Upon conclusion of this litigation, the attorneys shall return all documents containing confidential information and any and all copies made of such documents, including any documents or copies held by persons authorized under this order to have access thereto, except for copies which contain work notes of the attorneys or other authorized persons, which copies shall be destroyed. The return of such documents shall be accompanied by a certificate executed by a member of the Law Offices of Eugene L. Stewart attesting that the provisions of this paragraph have been complied with in all respects.

m. The attorneys shall promptly report any breach of the provisions of this stipulation to the Court; and it is further

ORDERED that the confidential status of all those documents in the administrative record (which record has been filed in this civil action (and in Court No. 82-10-01361)) which have been designated as "business confidential" (including those listed in Exhibit A) be maintained, except as provided above, until further order of the Court.

EXHIBIT A.—APPENDIX A

Page	Date	Title—Description
1664-1683	4/20/82	Questionnaire response and attachments
2069-2070	Undated	Highveld reconciliation between 1981 taxable income and financially reported income
2071	Undated	ISCOR reconciliation
2126-2127	Undated	Equity infusions into ISCOR from 1968
2766-2812	5/10/82	Supplementary questionnaire response from Highveld
2817-2821	5/14/82	Letter from Pienaar to Carmen with ISCOR supplementary questionnaire response
3647	7/1/82	ISCOR Loans
3755-3764	7/19/82	Verification report and exhibits
3765	Undated	Discount rate calculation
3766-3768	Undated	Quarterly Bulletin (December 1981)—South African Reserve Bank
3769	Undated	Equity calculations for ISCOR

EXHIBIT A.—APPENDIX A—Continued

Page	Date	Title—Description
		ISCOR Exhibits:
3872–3881	Undated	Printout of value of volume
3885–3886	Undated	ISCOR 1981 Tax Assessment
3887–3888	Undated	Statement of certain financial figures & facts for 1978–1981
3889–3890	Undated	Loan schedule A-B—(foreign loans guaranteed by the S.A. government)
3891–3939	Undated	Handlsbank's Investment Banking Activities
3940–3947	Undated	ISCOR loan prospectus 1981
3948–3969	Undated	ISCOR loan prospectus 1977
4008–4014	Undated	Summary of ISCOR loans
4015–4019	Undated	Backup document for pages 3887–3888
4020	Undated	Sample of effective cost of guaranteed loans
		Highveld Exhibits:
4030–4031	Undated	Section and plate exports to U.S.A.
4035	Undated	Revised Reconciliation between 1981 taxable and reported income
4036	Undated	Revised answer to Question IV A Subsection 4 of the Questionnaire

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ARMCO, INC. AND CF&I STEEL CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND AH JU STEEL CO., LTD., ET AL., INTERVENORS

Court No. 80-9-01435

Before FORD, *Judge.*

Memorandum and Order

(Dated October 19, 1983)

Freeman, Wasserman & Schneider (Herbert Peter Larsen on the motion) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*Francis J. Sailer* on the motion) for the defendant.

FORD, *Judge:* Plaintiff has moved pursuant to Rule 59 of the Rules of this Court for a rehearing of a decision of this Court 6 CIT 111 (1983), which dismissed the action. In the original action both plaintiff and defendant had moved for summary judgment, plaintiff seeking to have the liquidations enjoined and the matter remanded to the International Trade Administration to determine whether any false, fictitious or fraudulent statements or representations were made during the course of its investigation, as well as setting aside all liquidations which had occurred.

The grounds relied on by plaintiff "are that this Court appears to have overlooked or misapprehended the impact of two recent cases cited in plaintiffs' reply to oppositions by defendant and intervenors to motion for preliminary injunction and remand: *Zenith Radio Corp.* v. *United States,* 710 F. 2d 806 (Fed. Cir., June 27, 1983)l and *Timken Co.* v. *United States,* 6 CIT 76 (1983)." It is the position of plaintiff that since the Court cited *S. J. Stile Associates Ltd.* v. *Dennis Snyder,* 68 CCPA 27, C.A.D. 1261, 646 F. 2d 522 (1981) and enumerated the elements necessary for a preliminary injunction, it must have relied heavily upon said decision. The *Stile* case was cited and the elements for a preliminary injunction enumerated merely as *dicta,* since the action was dismissed on the ground that any fraudulent statements did not affect the decision of the ITA. Therefore, the decision of dismissal did not require consideration of the issuance of a preliminary injunction.

In Slip Op. 83-88 the Court, in considering the merits of the matter of remand, reviewed the factual situation and made the following observation:

> Mitsui (U.S.A.) admitted to filing false customs documents, the Special Summary Steel Invoices, in violation of 18 U.S.C. 371. The latter invoices were utilized by customs to determine whether sales were being made below the "trigger price". However, the information utilized to determine less than fair value margins did not involve the price from Mitsui (U.S.A) to its customers in the United States. The purchase price was calculated on the basis of the price *to* and unrelated trading company or *to* an unrelated purchaser in the United States. 45 Fed. Reg. 3942. The determination by the ITA involved the price *from* the nail manufacturing companies *to* the trading companies. This was the price that was compared to foreign market value which would not be affected by any subsequent fraud on the part of a trading company in dealings with its customers in the United States.

The Court further stated:

> Since it was the price of the Korean nail manufacturing companies to the trading companies that established less than fair value margin, that margin could not have been affected by the subsequent price from the Japanese trading companies to its customers.

Under the foregoing circumstances it is apparent that the purpose of the preliminary injunction was to enjoin the liquidation of the entries until the ITA could make its finding and return the matter to the Court for determination. The *Zenith* and *Timken* cases unquestionably stand for the proposition that liquidation in and of itself is sufficient grounds for holding that irreparable harm has been established. However, this issue is moot for the reasons set forth in the dismissal of the matter by Slip Op. 83-88.

Plaintiff's motion is therefore denied.

Acccordingly, it is

ORDERED that plaintiff's motion, under Rule 59 for a rehearing, be and the same hereby is denied.

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573 F. Supp. 1145

BRITISH STEEL CORPORATION AND BRITISH STEEL CORPORATION, INC., PLAINTIFFS *v.* UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Court Nos. 83-5-00732 (and 83-7-01032)

Before BERNARD NEWMAN, *Judge.*

Review of Final Affirmative Countervailing Duty Determination—Time for Commencement of Action

Action for review of final affirmative countervailing duty determination under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) commenced within thirty days after the date of publication of the determination, but prior to the publication of a countervailing duty order based upon the determination, is premature under section 1516a(a)(2)(A)(ii) and must be dismissed for lack of jurisdiction.

While 28 U.S.C. § 2636(c), relied upon by plaintiffs, provides that the thirty day time period within which an action may be commenced for review of a determination listed in section 1516a runs from the date of the publication of such "determination" in the Federal Register, nevertheless the legislative history of section 2636(c) clearly manifests Congress' intent to merely restate the law set forth in section 1516a. H.R. Rep. No. 1235, 96th Cong. 2d Sess. 56 (August 20, 1980); S. Rep. No. 466, 96th Cong., 1st Sess. 17 (December 7, 1979).

[Defendants' motion to dismiss granted; plaintiffs' cross-motion to consolidate present action with Court No. 83-7-01032, and to prescribe the time for service of an answer, denied.]

(Decided October 21, 1983)

Steptoe & Johnson Chartered (Richard O. Cunningham, Charlene Barshefsky and *Alice L. Mattice, Esqs.* on the brief), for the plaintiffs.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, and *Sheila N. Ziff, Esq.* on the brief, for defendants.

BERNARD NEWMAN, *Judge:*

INTRODUCTION

Plaintiffs have instituted this action for review of the final affirmative countervailing duty determination of the International Trade Administration of the Department of Commerce ("ITA"), made pursuant to 19 U.S.C. § 1671d, respecting certain stainless steel imports from the United Kingdom. Presently before the Court for determination are defendants' motion to dismiss Court No. 83-5-00732 for lack of jurisdiction on the ground that the action was filed prematurely; and plaintiffs' cross-motion for an order consolidating this action with Court No. 83-7-01032 and directing defendants to file their answer in the consolidated actions within fifteen days after the disposition of these cross-motions. Alternatively, if defendants' motion to dismiss is granted, plaintiffs seek an order requiring defendants to serve their answer to the complaint in Court No. 83-7-01032 within fifteen days after the disposition of these cross-motions.

THE FACTS

On April 20, 1983, ITA issued its final affirmative countervailing duty determination pursuant to 19 U.S.C. § 1671d, which was published in the Federal Register on April 27, 1983. 48 F.R. 19,048-054. On May 18, 1983, plaintiffs commenced the instant action contesting that determination. Subsequently, ITA issued its final countervailing duty order, effective June 23, 1983, respecting stainless steel plate from the United Kingdom. That order was published in the Federal Register on June 23, 1983. 48 F.R. 28690.[1]

Thereafter, on July 21, 1983 plaintiffs commenced a second lawsuit (Court No. 83-7-01032) challenging ITA's countervailing duty order of June 23, 1983, which action raises the identical substantive issues as that presented in the within case. Plaintiffs' complaint in Court No. 83-7-01032 alleges that such action was instituted "[a]s a precaution to insure technical compliance with the provisions of 19 U.S.C. § 1516a(2)(A)(ii)" (sic).

PARTIES' CONTENTIONS

In support of their motion to dismiss, defendants argue that jurisdiction in this case must be predicated upon 28 U.S.C. § 1581(c), and that actions under that provision challenging an ITA final affirmative determination must be commenced within thirty days after the publication of a countervailing or antidumping duty *order* in accordance with 19 U.S.C. § 1516a(a)(2)(A)(ii). Therefore, according to defendants, since the first action (83-5-00732) was commenced on May 18, 1983, prior to the publication of the countervailing duty *order* of June 23, 1983, such action was filed prematurely and must be dismissed.

Plaintiffs insist that the time for commencement of the present action is governed by 28 U.S.C. § 2636(c), which specifies that the action must be commenced within thirty days after the date of the publication of the *determination* in the Federal Register. Inasmuch as this action was brought within thirty days after the publication of the final countervailing duty *determination* of April 27, 1983, plaintiffs maintain that this action was not filed prematurely.

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[1] In this connection, on June 10, 1983 the International Trade Commission, ("ITC") issued a final affirmative injury determination in the investigation of imports of stainless steel plate from the United Kingdom. On the same date, ITC rendered a final negative injury determination respecting imports of stainless steel sheet and strip from the United Kingdom.

OPINION

The issue presented is whether an action contesting a final affirmative countervailing duty determination is properly instituted prior to the publication of the countervailing duty order.

Final affirmative countervailing duty determinations of the ITA and ITC are reviewable by the Court of International Trade under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c). An interested party may commence an action challenging the final affirmative determinations mentioned in § 1516a(a)(2)(B)(i) within thirty days after the date of publication in the Federal Register of a countervailing duty *order* based upon the determinations described in clause (i) of subparagraph (B). 19 U.S.C. § 1516a(a)(2)(A)(ii). There is no dispute that here, the action was filed within thirty days after the date the final affirmative determination was published in the Federal Register and prior to the publication of the countervailing duty order of June 23, 1983. Plaintiffs, however, argue that under 28 U.S.C. § 2636(c), this action would have been barred unless commenced within thirty days after the date of the publication of the final affirmative determination in the Federal Register. Thus, section 2636(c) states:

> (c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930, other than a determination under section 703(b), 703(c), 733(b), or 733(c) of such Act, is barred unless commenced in accordance with the rules of the Court of International Trade within thirty days after the date of the publication of such determination in the Federal Register.

It is apparent that as applied to the facts in this case, where the action was commenced within thirty days after the date of publication of the final affirmative determination, but prior to the publication of the countervailing duty order, there is an incongruity in the literal provisions of 19 U.S.C. § 1516a(a)(2)(A)(ii) and 28 U.S.C. § 2636(c).

The general rule of construction where conflict is found between two statutes is that the most recent provision must control as the latest expression of the legislative intent. *Ullman* v. *United States,* 1 Ct. Cust. Appls. 61, T.D. 31032 (1910). However, this rule is subject to recognized exceptions, and should never be applied except in a case where the repugnancy between the two statutes is irreconcilable. *Id.* at 62. A statute is to be construed with reference to other statutes in *pari materia* "by a general survey of the whole context, and the provisions are to be made to stand together if possible". *Id.* at 62. Consequently, in resolving the present issue involving statutes seemingly in conflict when applied to the present factual situation "it is the duty of [the Court] to try to harmonize the same so as to give each of them meaning and to bring about such a result as was reasonably within the contemplation of the legislature * * *". *Beaver Products Co.* v. *United States,* 17 CCPA 434, 437, T.D. 43878 (1930). *See also Zenith Radio Corp.* v. *United States,* 1 CIT 180, 185, 509 F. Supp. 1282, 1286 (1981), and cases cited.

While courts are ordinarily dutybound to interpret statutes in accordance with their clear meaning, statutory clarity does not bar a court's consideration of legislative history where such history clearly indicates "that the Congressional intent differed from that manifested by the language used". *Zenith Radio Corp.,* 1 CIT at 184, 509 F. Supp. at 1286 and cases cited therein. As previously observed in *Haarman & Reimer Corp.,* v. *United States,* 1 CIT 148, 151, 509 F. Supp. 1276, 1279 (1981), "[i]t is noteworthy that in the enactment of the Customs Courts Act of 1980, the Congress was particularly attentive to its predecessor act, the Trade Agreements Act of 1979", and that the two statutes are "companion measures" respecting the administration of the countervailing and antidumping laws.[2] Hence, I have no doubt that when enacting the Customs Courts Act of 1980, Congress was mindful of the time limitations upon judicial review prescribed by section 516A. Indeed, I cannot conceive of any expression of legislative purpose more explicit than that contained in H.R. Rep. No. 1235, 96th Cong. 2d Sess. 56 (August 20, 1980), which states that section 2636(c) "substantially restates the law set forth in section 516A of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979". *See also* S. Rep. No. 466, 96th Cong., 1st Sess. 17 (December 7, 1979). And as Chief Judge Learned Hand wisely observed in *Federal Deposit Insurance Corp.* v. *Tremaine,* 133 F. 2d 827, 830 (2d Cir. 1943):

> There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.

Moreover, in *Peter Pan Fabrics Inc.* v. *Martin Weiner Corp.,* 274 F.2d 487, 489 (2d Cir. 1960), Chief Judge Learned Hand admonished: "it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning."

Apart from a literal reading of the pertinent statutes, plaintiffs have called nothing whatever to the Court's attention which even remotely suggests that Congress intended in section 2636(c) to modify the time limitation specified in section 516A(a)(2)(A)(ii). While admittedly in section 2636(c) Congress provided that the time within which an action may be commenced runs from the date of publication of the "determination", nevertheless, as emphasized *supra*, Congress plainly manifested its intent that section 2636(c) merely restate the provisions of section 516A. It bears repetition to state that under section 516A(a)(2)(A)(ii) a final affirmative determination by the ITA or ITC may not be reviewed until after the publication of an *order* based upon the determination. *Cf. United States Steel Corp.* v. *United States*, 5 CIT 287 (June 28, 1983). *See also Bethlehem Steel Corp.* v. *United States*, 6 CIT 164 Slip Op. 83-97 (September 29, 1983).

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[2] Significantly, the House Judiciary Committee, responsible for the Customs Courts Act, worked closely with the House Ways and Means Trade Subcommittee, which had been responsible for the Trade Agreements Act, in order to ensure that the Customs Courts Act did not conflict with the Trade Agreements Act provisions. As pointed up by Rep. Rodino, Chairman of the House Judiciary Committee:

> [T]he Judiciary Committee has engaged in a continuing dialog with the Ways and Means Committee's Subcommittee on Trade to assure that H.R. 7540 is consistent with their work in American foreign trade policy, particularly in the area of imports.

126 Cong. Rec. H9842 (daily ed. September 22, 1980). *See also* H.R. Rep. No 1235, 96th Cong. 2d Sess. 20, 29 (August 20, 1980).

In short, since ITA had not yet published a countervailing duty order when plaintiffs filed their summons, this action was commenced prematurely.[3]

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted; and plaintiffs' cross-motion to consolidate is denied.

Since defendants filed an answer to the complaint in Court No. 83-7-01032 on September 26, 1983, plaintiffs' motion to limit defendants' time to answer the complaint in that action is denied as moot.

BELCREST LINENS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79-6-00953

Before BOE, *Judge*.

Merchandise consisting of bolts of embroidered cotton percale fabric originating in the People's Republic of China and shipped to Hong Kong where the fabric underwent the process of cutting at pre-determined markings, scalloping, sewing and hemming, thereby underwent a change in its identity, character and use from a bolt of cloth to a pillowcase, causing the subject merchandise to be a product of the intermediate country, Hong Kong.

[Judgment for plaintiff.]

(Decided October 25, 1983)

Mandell and Grunfeld (*Steven P. Florsheim* at the trial and on the brief), for the plaintiff.

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[3] Had this action been filed within the time prescribed by 19 U.S.C. § 1516a(a)(2)(A)(ii), the Court would have jurisdiction to review the countervailing duty order and underlying final affirmative determination under 28 U.S.C. § 1581(c). Consequently, plaintiffs' reliance upon 28 U.S.C. § 1581(i) as a basis for this Court's jurisdiction is entirely without merit. The legislative history of section 1581(i) unequivocally shows Congress did not intend that section 1581(i) be used to circumvent the system of judicial review established under section 1516a. See H.R. Rep. No. 96-1235, at p. 48. See also *Royal Business Machines, Inc.* v. *United States*, 69 CCPA 61, 669 F.2d 692 (1981).

As indicated *supra*, plaintiffs protected their rights by commencing a second action on July 21, 1983, within thirty days after publication of the involved countervailing duty order (Court No. 83-7-01032)—and that action, of course, remains pending.

J. Paul McGrath, Assistant Attorney General; (*Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Saul Davis* at the trial and on the brief), for the defendant.

BOE, *Judge:* The subject merchandise in the above-entitled action consisting of embroidered cotton (percale) pillowcases, was classified during the years 1976–1977 under item 363.01 of the Tariff Schedules of the United States (TSUS). In so doing, the customs officials found that the said merchandise was a product of the People's Republic of China (China) and pursuant to General Headnote 3(e), TSUS assessed duty thereon at the column 2 rate of 90% ad valorem.[1]

The plaintiff does not contest the classification of the subject merchandise under item 363.01 TSUS, but contends that the merchandise was a product of Hong Kong. Accordingly, plaintiff claims that the proper assessed duty to be at the column 1 rate of 34% ad valorem.

At the trial of the instant action stipulations entered into between counsel for the respective parties were offered in evidence and received by the court. The provisions thereof provide:

STIPULATION

1. The imported merchandise consists of pillowcases shipped from Hong Kong to the United States.

2. The imported pillowcases resulted from the following processes performed in the People's Republic of China ("China"):

(a) Percale, a cotton fabric, was manufactured by, *inter alia,* a weaving process, in widths of approximately 40";

(b) The piece goods (bolts of fabric) were laid out on a long table. A stencil was placed on top of the fabric and inked, at pre-determined intervals, of approximately 33", for:

(1) An embroidery pattern of flowers or birds;

(2) Cutting marks to indicate the precise point at which the fabric is to be cut at a later time; and

(3) Scalloping—which is a design of a continuous series of circle segments forming the border along one edge of the fabric.

(c) The piece goods were than embroidered on the stencilled pattern of flowers or birds;

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[1] Section 5 of the Trade Agreements Extension Act of 1951 removed imports from communist countries from the application of reduced rates of duty. By Presidential Proclamation issued August 1, 1951, Harry S. Truman further defined the included articles as those "imported directly or indirectly into the United States" from nations under Communist domination and control. The Tariff Schedules of the United States in 1976–1977 included General Headnote 3(e) which replicates the language of the 1951 Presidential Proclamation:

(e) *Products of Communist Countries.* Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion Act of 1962, or to action taken by the President thereunder:

Albania.
Bulgaria.
China (any part of which may be under Communist domination or control).

* * * * * * *

The bilateral trade treaty of 1979 granted Chinese goods most favored nation status subject to a column 1 rate of duty. Agreement on Trade Relations, July 7, 1979, United States—People's Republic of China, 31 U.S.T. 4651, T.I.A.S. 9630.

(d) The piece goods were then folded and shipped to Hong Kong.

3. A "reconstructed," illustrative sample of the piece goods, as shipped from China to Hong Kong is submitted with and made a part of this stipulation as Joint Exhibit 1. Joint Exhibit 1 was reconstructed from pillow case [sic] cut apart and sewn into a continuous length, and marked with ink to show the cutting marks and scallop marks. Exhibit 1 differs from the merchandise described in paragraph 2 as to length, width, and possibly, fabric and embroidery pattern.

4. The imported pillowcases resulted from the following processes performed in Hong Kong:

(a) The piece goods were laid out on a long table, and cut to size at the pre-determined ink cut-marks;

(b) One edge was scalloped on the pre-stenciled scallop marks with colored thread;

(c) The merchandise was folded in half and sewn along 2 edges;

(d) These articles were than turned inside-out, placed in a container, and moistened with water and a whitener;

(e) The merchandise was pressed, folded, wrapped, and packaged.

5. A sample of a pillow case [sic] that is the same in all material respects to the subject merchandise is submitted with and made a part of this stipulation as Joint Exhibit 2.

6. Plaintiff has no knowledge of the time, cost, or labor comparisons for the processes performed in Hong Kong and China.

Supplemental Stipulation

7. The merchandise exported from China was purchased by plaintiff.

8. With respect to the merchandise exported from China, plaintiff is unaware of any actual use of such merchandise other than to be made into pillowcases.

The issue to be determined in the instant action is whether the subject merchandise is a product of China and, pursuant to General Headnote 3(e), TSUS, subject to the column 2 rate of duty of 90% ad valorem, or the product of Hong Kong and, accordingly, subject to the column 1 rate of duty.

It is a general proposition of Customs law that "[m]erchandise imported from one country, being the growth, production or manufacture in another country, must be appraised at its value in the principal markets of the country from which immediately imported * * *" *United States* v. *G. W. Sheldon & Co.*, T. D. 42, 451, 53 Treas. Dec. 34, 36 (1928). When, however, merchandise is transported from Country A (the country of origin) to Country B (an intermediate country), Country A is looked upon as the country of exportation *only* if from all of the facts under determination it appears that:

> (1) No part of the merchandise was intended for diversion into the commerce of the intermediate country;

(2) None of the goods were, in fact, diverted into the commerce of the intermediate country;

(3) A contingency of diversion did not exist; and

(4) None of the merchandise was in any way treated, processed, altered, manipulated or changed in character in the intermediate country.

Cardinal Glove Inc. v. *United States,* 4 CIT 4 (1982); *Hospitaline, Inc.* v. *United States,* 48 Cust. Ct. 563 (1962), *aff'd* 50 Cust. Ct. 556 (1963); *United States* v. *F. W. Hagemann,* 39 CCPA 182 (1952); Customs Service Decision 79-186, 13 Cust. B. & Dec. 1253 (1979); *Tower & Sons* v. *United States,* T. D. 3535, 67 Treas. Dec. 1358 (1935).[2]

The provisions of General Headnote 3(e), however, impose a stricter test in defining products originating from communist countries. In order to preclude the possibility that products of communist or communist-dominated countries might be transshipped through a non-communist intermediate country in order to avoid a higher column 2 rate of duty, the provisions of General Headnote 3(e) applied to products, *whether imported directly or indirectly from communist countries.*

In the case of *Chemo Puro Mfg. Co.* v. *United States,* 34 Cust. Ct. 8, 146 F. Supp. 178 (1954), this court first considered the provisions of General Headnote 3(e) with respect to the importation of tannic acid produced in the United Kingdom out of nutgalls imported from China. Determining that the imported tannic acid was a product of the United Kingdom and not of China, the court pointed out that the tannic acid had been given a new identity definite and distinct from nutgalls, bearing a new name, use and tariff status.

Similarly, this court in *F. W. Myers & Co.* v. *United States,* 36 Cust. Ct. 5 (1955) held that an advanced drug compound manufactured in Canada from a crude drug originally shipped from China to England and thence to Canada was a product of Canada. The raw materials, although originating in China, were deemed by the court to have been processed into an entirely new product in Canada.

Without reference to the foregoing decisions our appellate court first considered the application of General Headnote 3(e) in relation to a determination of the country of exportation in *United States* v. *Hercules Antiques, The Danwill Co.,* 44 CCPA 209 (1957).

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[2] The defendant, citing *United States* v. *Texas Instruments, Inc.,* 69 CCPA 151, 681 F. 2d 778 (1982), contends that the legal standard to be used in the instant action "is whether that article had been substantially transformed into a new and different article of commerce." The defendant is misguided in its generalized characterization of that decision.

In *Texas Instruments* the court determined that the assembly and encapsulation of certain components in Taiwan resulted in products "produced in the beneficiary developing country" and thereby within the provisions of 19 C.F.R. 10.177(a)(2):

> (2) Substantially transformed in the beneficiary developing country into a new and different article of commerce.

Thus, it is clear that in the *Texas Instruments* decision the tests specifically required by the customs regulations included the substantial transformation standard.

See quotation from *Hercules* in this opinion at page 7 relating to General Headnote 3(e).

In pointing out the difficulty in adopting uniform or exact standards for applying General Headnote 3(e), the court stated: [3]

> It would be difficult, if not impossible, to define exact standards for determining the duration of stay of merchandise in an intermediate country, the nature of the transactions to which it is subjected there, and other circumstances necessary to divest it of its status as an import, direct or indirect, from the Communist-dominated country in which it originated. At 212.

In holding that evidence was insufficient to establish that merchandise originating from Czechoslovakia, sold in Holland and thence imported into the United States was not imported "directly or indirectly" from Czechoslovakia, the appellate court stated:

> However, we are of the opinion it must be established by appropriate evidence that the merchandise has actually become a *bona fide* part of the commerce of the intermediate country. (Italics in original; emphasis added.) *Id.* at 212–13.

The standard enunciated by our appellate court in *Hercules* was followed by this court in *Couture Fabrics, Ltd.* v. *United States,* 41 Cust. Ct. 369 (1958). This court found that certain silk goods imported into the United States from China, withdrawn without the payment of duty, exported to Switzerland, and subsequently returned to the United States had become a *bona fide* part of the commerce of Switzerland because Swiss customs duties were paid on the merchandise.

In *Moresco Corp.* v. *United States,* 63 Cust. Ct. 295 (1969), this court determined that the addition in West Germany of "stabilizing" chemicals to a chemical compound produced in East Germany was not sufficient to cause the product to become one of West Germany. The court, recognizing the decisions in *Chemo Puro, F. W. Myers* and *Hercules* concluded:

> Similarly, in the case at bar, there is no showing that the imported trichloroethylene was ever sold or offered for sale in West Germany. It further appears that since it arrived in West Germany in a stabilized state, it was transported to the United States without any change in character in West Germany. The addition of more stabilizers in West Germany cannot be considered a process of manufacture so as to constitute the trichloroethylene a product of West Germany. In our opinion, the record herein warrants a finding that the merchandise here in question had not actually become a *bona fide* part of the commerce of West Germany so as to entitle it to the reduced rate of duty claimed by the plaintiff. (Italics in original; emphasis added.) At 302.

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[3] The court in *Hercules* further pointed out that the alteration of goods in an intermediate country, as in *Camera Specialty Co. and Rohner Gehrig & Co.* v. *United States,* 34 Cust. Ct. 27 (1955), distinguished that decision from the holding in *Hercules.*

In the instant action, the stipulated facts indicate that the subject merchandise underwent a process which changed its character from an embroidered bolt of percale fabric to a pillowcase in the intermediate country of Hong Kong. It is acknowledged that the woven piece goods originating in China were 40" wide and marked for cutting at a later date and in a subsequent process. However, the process performed in Hong Kong—cutting the fabric at the determined lengths, scalloping the border on one edge of the fabric, hemming and the sewing along two edges of the piece goods—caused a change in the character and identity of a bolt of woven cotton cloth into an article designed specifically for the purpose of enclosing a pillow. The process of altering and manipulating the bolt of woven fabric shipped from China resulted in such a changed character or identity of the merchandise so as to become the product of Hong Kong.

Joint Exhibits 1 and 2 patently evidence to the court the change in the character and identity of Exhibit 1 resulting from its further processing in Hong Kong. The embroidered pillowcase, Exhibit 2, indeed is an article different in appearance, identity and use from the bolt of embroidered cotton fabric, Exhibit 1. An exhibit may be a potent witness. *Marshall Field & Co.* v. *United States,* 45 CCPA 72 (1958); *Texas Instruments, Inc.* v. *United States,* 1 CIT 236 (1981).

The defendant, however, has placed its reliance on certain court decisions which clearly do not embody the issues of the instant action. Citing *Doherty-Barrow of Texas, Inc.* v. *United States,* 3 CIT 228 (1982) and *Lee Enterprises, Inc.* v. *United States,* 84 Cust. Ct. 208 (1980), the defendant contends that the subject merchandise was substantially completed at the time of its shipment from China and, in fact, constituted unfinished pillowcases. Citing *Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), the defendant further contends that no substantial transformation of the merchandise occurred in Hong Kong and, accordingly, the subject merchandise obtained its status as an unfinished pillowcase in China.

The tests as to whether an article is *finished or unfinished* or *substantially transformed* in the course of its shipment to an intermediate country have not been used in the determination of the country of exportation. In light of our appellate court's reluctance to adopt any exact standard or standards in determining the applicability of General Headnote 3(e) (as evidenced by the aforecited quotation from *Hercules*), decisions construing the marking statute (19 U.S.C. § 1304) and customs regulations relating thereto or General Interpretative Rule 10(h), TSUS, are not controlling.

Suffice it to say, however, in the opinion of this court the change of identity and the use of the subject merchandise as the result of its processing in Hong Kong, in fact, was of such a nature that it would have met the requirements of the substantial transformation test had the court used the test urged by the defendant.[4]

From the stipulated facts and the Joint Exhibits 1 and 2 presented herein, this court is of the opinion that the subject merchandise at the time of importation into the United States was a product of Hong Kong and not a product of China subject to the provisions of General Headnote 3(e), TSUS. Accordingly, the subject merchandise must be classified under item 363.01, TSUS, at the column 1 rate of duty of 34% ad valorem.

Let judgment be entered accordingly.

V. G. NAHRGANG CO., F/A ANTHONY PAGLIALUNGO, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-4-00410

Before BERNARD NEWMAN, *Judge*.

On Plaintiff's Motion Pursuant to Rule 59 for Rehearing and Amendment of Judgment

[Plaintiff's motion denied.]

(Dated: October 26, 1983)

Sonnenberg & Anderson, Esqs. (Paul S. Anderson and *Steven P. Sonnenberg, Esqs.*, on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Jerry P. Wiskin, Esq.*, on the brief for the defendant.)

BERNARD NEWMAN, *Judge:* Plaintiff has moved pursuant to Rule 59 of the Rules of the Court of International Trade for a rehearing and amendment of the decision and judgment dated August 8, 1983 in this action. 6 CIT 85 (1983). There, this Court overruled plaintiff's claim that certain waterproofing material invoiced as "Paralon NT4" and "Paralon 77" was dutiable under item 771.42 of the Tariff Schedules of the United States (TSUS) and sustained the classification of the merchandise by Customs under item 355.25, TSUS.

The predicates for plaintiff's motion are that "the interpretation given to Headnote 2, Schedule 4, Part 4, Subpart A, by the Court relative to the definition of 'synthetic plastics materials' was in error as a matter of law", and that "a case has come to the attention of plaintiff in the interim and which was recently decided, which case could serve as controlling precedent for the issues involved in the subject action." (Plaintiff's motion, 1.) Plaintiff urges the Court to grant a rehearing and hold that the subject merchandise is classifiable under item 771.42, TSUS or alternatively, find that the merchandise is properly classifiable under 359.60, TSUS—a claim asserted for the first time in this case. For the reasons that follow, plaintiff's motion is denied in all respects.[1]

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[4] This court's reference to the substantial transformation test, relied upon by the Government in *Cardinal Glove Co.*, emphasized that the change in the identity of the subject merchandise therein was of such a nature that it would meet the requirements of the substantial transformation test used in connection with the marking statute.

Fundamentally, of course, a motion for rehearing is addressed to the sound discretion of the Court. *Commonwealth Oil Refining Co.* v. *United States,* 60 CCPA 162, 166, C.A.D. 1105, 480 F.2d 1352 (1973); *United States* v. *Shell Oil Co., Inc.,* 44 CCPA 54, C.A.D. 637 (1957); and *Thornley & Pitt* v. *United States,* 19 CCPA 221, T.D. 45325 (1931). The appropriate circumstances for granting a rehearing were succinctly articulated by Judge Watson in *W. J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, C.R.D. 72-5 (1972) as follows:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding. [Footnote omitted.] 68 Cust. Ct. at 358.

In support of the instant motion, plaintiff has failed to establish any appropriate basis for granting a rehearing.

Plaintiff's first argument in support of its motion is that this Court erred in its interpretation of the definition of synthetic plastics materials in Headnote 2, Schedule 4, Part 4A, TSUS, and therefore incorrectly concluded that the mastic portion of the Paralon products did not constitute plastics within the meaning of Headnote 2 and the superior heading to item 771.42, TSUS. Specifically, contends plaintiff, the definition in Headnote 2 does not require that the mastic be formed by condensation, polymerization or copolymerization in order to be regarded as a synthetic plastics material. Additionally, plaintiff asserts it was unnecessary to show that the mastic is derived from polypropylene to come within Headnote 2.

Concerning the first sentence of the definition in Headnote 2, Schedule 4, Part 4A, TSUS covering the three permissible processes enumerated above for forming synthetic plastics materials, plaintiff insists that the term *embraces* "connotes a general range of products to be included, but in no way limits the definition to such products along." (Plaintiff's Memorandum, 5.) I disagree.

Aside from plaintiff's failure to cite any precedent or legislative history to support its open-ended construction of the TSUS term "embraces", as employed in the first sentence of the definition in

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[1] The plaintiff's request for oral argument has been noted, but in view of the conclusions reached herein and in the interest of judicial economy, oral argument is unwarranted. Accordingly, I am constrained to deny plaintiff's request for oral argument.

Headnote 2, plaintiff's understanding of this portion of the definition is simply not supported by its context.

It is this Court's view that the term "embraces" in the context of the first sentence of Headnote 2 was intended to encompass the entire range of products which are to be considered as synthetic plastics materials for purposes of the tariff schedules. Had Congress intended the term "embraces" to mean "includes, but not limited to", as inferred by plaintiff's argument, the drafters of the tariff schedules could simply have used the latter quoted phrase as in fact was done in the third sentence of this very same headnote, as well as in many other places in the TSUS. *See e.g.* Headnote 2(d), Schedule 2, Part 4. It may be observed that in addition to the term "embraces", the drafters of the tariff schedules utilized several introductory definitional terms in the TSUS, *e.g.*: "includes" (Schedule 1, Part 4, Subpart A, Headnote 1); "means" (Schedule 1, Part 8, Subpart C, Headnotes 1 (a) and (b)); "covers" (Schedule 4, Part 5A, Headnote 1); and "refers to" (Schedule 4, Part 9A, Headnote 2(b)). Absent any expansive language to the effect that the scope of the TSUS definition includes, ***but is not limited to***, certain products or stated specification, we must take the stated criteria or requirements of the definition as applicable to the full range of products covered by the definition.

We reach plaintiff's contention regarding the third sentence of Headnote 2, Schedule 4, Part 4A. Under that portion of the definition, arguably had plaintiff established that the mastic is polypropylene, then plaintiff would have met its burden of proof under Headnote 2. However, it was clearly shown at the trial that the mastic portion of the Paralon products is composed of a combination of bitumen and polypropylene, with the bitumen constituting some 70 per cent by weight of the mastic.

In sum, plaintiff has failed to show either that the mastic was formed by condensation, polymerization or copolymerization, as specified by the first sentence of the definition, or that the mastic is "polypropylene", which is an enumerated plastics material in the third sentence of the definition.[2] Consequently, I adhere to my previous conclusion that plaintiff has failed to establish that the mastic portion of the Paralon products is a plastics material within the purview of Headnote 2 and the superior heading to item 771.42.

In any event, what plaintiff's arguments amount to is, simply, dissatisfaction with this Court's interpretation of the statutory definition in issue. Relative to this aspect of plaintiff's motion, there has been no showing of any of the factors discussed in *W.J. Byrnes, supra*, which would satisfy the requisites for a rehearing.

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[2] The use of the language in Headnote 2 of "*these* products" (emphasis added) in the second sentence and "*such* products" (emphasis added) in the third sentence is indicative that the enumerated products in the third sentence (and any other non-enumerated products) must meet the requirements of the first two sentences. Otherwise, the terms "these" and "such" are superfluous in the second and third sentences. Also, note the use of the word "these" in the last sentence of the headnote.

Plaintiff's remaining contention, that the recent decision in *Semperit of America, Inc.* v. *United States,* Court No. 79–6–01021, Abs. Protest Dec. No. P83–201, 17:30 Cust. Bull. 27 (July 5, 1983), is a controlling precedent in this case, is likewise without merit.

Semperit was submitted to the Court for judgment on an agreed statement of facts, and as such, was decided without trial, briefing, or opinion of the Court. Moreover, the *Semperit* matter involved the classification of merchandise different from that involved in the present case, and the TSUS provisions which are in issue in the present action—*viz,* items 355.25 and 771.42, TSUS—were not involved in the *Semperit* decision. Plainly then, a motion for rehearing need not be granted on the basis of a new claim where there is no assertion or indication of newly discovered evidence or other appropriate ground.[3]

Concluding, plaintiff has failed to demonstrate any of the requisites for the granting of a rehearing, and accordingly, the original decision must be adhered to.

Plaintiff's motion under Rule 59 is denied in all respects.

St. Regis Paper Company, plaintiff v. United States, defendant

Court No. 79–4–00673

Before Rao, *Judge.*

On Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Plaintiff's motion denied. Defendant's cross-motion denied.]

(Dated October 28, 1983)

Freeman, Wasserman & Schneider (*Louis Schneider, Herbert Peter Larsen,* and *Philip Yale Simons,* on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, (*Barbara M. Epstein,* on the brief) for the defendant.

Rao, *Judge:* This civil action involves the proper classification of merchandise described in the invoices as black calendered paper imported from the Federal Republic of Germany entered at New York in 1978. It was classified by the United States Customs Service (Customs) under item 252.90, Tariff Schedules of the United States, as

> Papers, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated;
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> * * * * * * *

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[3] While plaintiff has requested that it be permitted to submit additional evidence on the issue of whether the mastic constitutes a plastics material, plaintiff has not disclosed specifically what the new evidence would show, nor has plaintiff stated that the evidence proposed to be submitted was not previously available.

> Other, not specially provided for:
>
> * * * * * * *
>
> Weighing over 18 pounds per ream:
>
> * * * * * * *
>
> Other. * * *

with a duty rate of 10 percent ad valorem.

It is the plaintiff's position that the imported merchandise is properly classified under item 252.05, TSUS, as

> Papers, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated:
>
> Basic paper to be sensitized for use in photography. * * *

and is dutiable thereunder at the rate of one percent ad valorem.

Plaintiff further claims that after importation, the merchandise is sensitized by coating with zinc oxide and by other means in order to import photo-conductive properties to it and that the resultant sensitized paper is used as the electrophotographic master or matrix in a xerographic photocopy machine. It is plaintiff's position that the process of xerography is considered to the photography.

Defendant's position is that xerography is not photography within the meaning of the word for tariff schedule purposes. It also states that issues of fact remain which must be resolved at trial. Alternatively, it cross-moves for summary judgment.

A review of the record before the court indicates that there are material issues of fact in issue that remain to be resolved on a trial on the merits and that summary judgment should be denied to both parties. *S. S. Kresge Co.* v. *United States,* 77 Cust. Ct. 154, C.R.D. 76–6 (1976); *Carson M. Simon & Co.* v. *United States,* 3 CIT 4 (1982).

Summary judgment is a drastic remedy which precludes the parties from exercising their right to present evidence to the court on a full trial on the merits. *Donnelly* v. *Guion,* 467 F.2d 290 (2d Cir. 1972). When deciding summary judgment motions the court should resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1982); *S. S. Kresge Co.* v. *United States, supra,* at 157. Whether the parties seek summary judgment on cross-motions is of no consequence. Such cross-motions do not warrant a grant of summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts as to which there is no genuine dispute. *Painton & Co.* v. *Bourns, Inc.,* 442 F.2d 216 (2d Cir. 1971). The function of the court on summary judgment motions is fact finding and not fact determination. The court cannot try issues of fact on a summary judgment motion, it can only determine whether there are factual issues to be tried. *Carson M. Simon & Co.* v. *United States, supra,* at 6.

In the instant action, the court is asked to grant judgment to the plaintiff on the basis of one affidavit by an employee of plaintiff who was involved in the research and development of the imported merchandise and who states that it is his belief that the xerographic process is a photographic process. Attached are excerpts from various books and encyclopedias which tend to support plaintiff's position.

Defendant cites other authorities which differentiate between xerography and photography. The court cannot determine from the proof presented whether the xerographic process is a photographic process. Additionally, defendant has raised the issue as to whether the imported merchandise comports with other criteria required to be satisfied for classification under the claimed item, TSUS.

Accordingly, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are, in all respects, denied.

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574 F. Supp. 1064

F. W. MYERS & CO., INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Before BOE, *Judge*.

Court No. 80-5-00828

Opinion and Order

[Motion of plaintiff, granted; cross-motion of defendant, denied.]

(Dated November 3, 1983)

Arter, Hadden & Hemmendinger (*David B. Hopkins* on the brief); *Davis, Graham & Stubbs* (*Barry E. Cohen* on the brief), for the plaintiff.

J. Paul McGrath, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *John J. Mahon* on the brief), for the defendant.

BOE, *Judge:* Plaintiff seeks an order of this court determining that the summons commencing the above-entitled action was timely filed with regard to protest No. 3801-9-000272.[1] The defendant by cross-motion moves to sever and dismiss the said protest because of plaintiff's failure to file the summons within 180 days from the date of mailing of notice of denial pursuant to 28 U.S.C. § 2636(a).

The following facts are undisputed:

(1) The plaintiff filed protest No. 3801-9-000272 on July 19, 1979,

(2) The United States Customs Service denied the protest on September 10, 1979,

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[1] This action is the subject of a proposed submission on an agreed statement of facts. No dispute exists as to the timeliness of the filing of the remaining eight protests involved in this action.

(3) The plaintiff filed a summons contesting the denial of protest No. 3801-9-000272 and others on May 23, 1980,

(4) The period of time between September 10, 1979 (the denial date), and May 23, 1980 (the date of filing the summons) is 256 days.

The plaintiff, through the affidavit of one of its employees, alleges that it never received written notice of denial of the subject protest and that an examination of the master file of Customs by the affiant in May 1980 disclosed no evidence that the Customs Service had mailed the notice to the plaintiff.

In support of its cross-motion defendant, through the affidavit of an employee serving as a Customs Entry Aid, describes the "invariable" practice in preparing notices of protest denial and the deposit of same in the United States mail chute located in the employee's building.

A civil action contesting a denial of a protest is barred unless commenced within the time provided by statute. The mailing of a notice of denial is a prerequisite to the commencement of the time limitation period. 28 U.S.C. § 2636(a) provides:

> (a) A civil action contesting the denial in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade—
>
> > (1) Within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act * * *

See Knickerbocker Liquors Corp. v. *United States,* 78 Cust. Ct. 192, 196, 432 F. Supp. 1347, 1351 (1977).

Implicit in the term "notice," as contained in the statute, is the requirement that the protestant shall be made aware of the denial of the protest by Customs. Congress has mandated mailing as the manner of giving such notice. When the fact of mailing is placed in issues the beginning of the 180 day time limitation period for the commencement of an action is correspondingly in issue.

Proof of mailing raises a presumption of delivery. *Miller* v. *United States,* 71 Cust. Ct. 57, 62, 364 F. Supp. 1390, 1394 (1973). *See United States* v. *International Importers, Inc.,* 55 CCPA 43 (1968). This presumption, however, may be rebutted. It is recognized that evidence of non-receipt may invoke a contrary presumption. "The failure to receive a notice through the mail raises a presumption that it was not mailed." *Orlex Dyes & Chemicals Corp.* v. *United States,* 41 Cust. Ct. 168, 170, 168 F. Supp. 220, 222 (1958).[2]

When non-receipt has been established or a presumption has been raised by plaintiff's evidence, the burden of proof to demonstrate the fact of mailing shifts to the defendant. *Orlex Dyes & Chemicals Corp.*, 41 Cust. Ct. at 170, 168 F. Supp. at 222. *See Clayton Chemical & Packaging Co.* v. *United States*, 38 Cust. Ct. 617, 619, 150 F. Supp. 628, 630 (1957).

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[2] In *Orlex Dyes & Chemicals Corp.*, the court held that a presumption of non-mailing was raised by plaintiff's witness who testified that "to the best of his knowledge and belief, the notice had not been received, and * * * that an examination of the file did not disclose either the original or a photostatic copy * * *"

In the instant action, both parties have submitted affidavits in support of their contentions. In paragraph 3 of the affidavit submitted by plaintiff, the affiant states, "We searched our files and were unable to locate any notice of Customs Service action on this protest [protest No. 3801-9-000272], and we believe that no notification was sent to us." As this court held in *Orlex Dyes & Chemicals Corp.*, testimony of this character is sufficient to raise the presumption of non-receipt of the notice of denial. Accordingly, the burden shifts to the defendant to prove the fact of mailing.

In the affidavit submitted by defendant, the affiant details the procedures generally followed by him and/or the Customs Service at the Port of Detroit in processing protests. At paragraph 10, the affiant admits, "I have no present recollection of sending out this particular protest denial, protest No. 3801-9-000272." In paragraph 11, however, the affiant maintains that "I personally affixed the date on the original, two duplicates and master file record, and personally mailed the original to plaintiff on that date." These conflicting statements cast doubt upon the credibility as well as the reliability of the defendant's affidavit.

Defendant's affidavit at paragraph 17 further states that "the Master File shows that Detroit protest No. 3801-9-000272 was prepared in the usual manner and mailed to the protestant on *September 10, 1979*" (emphasis added). In plaintiff's affidavit, however, the affiant claims she examined the master file of the Customs Service in *May 1980* and found no evidence that the notice of denial of protest No. 3801-9-000272 was sent to the customs broker.

From the evidence presented the court concludes that the contradictory evidence presented by the defendant is insufficient to prove the fact of mailing. In the opinion of the court the plaintiff has satisfactorily rebutted any presumption of mailing which may have been raised by the defendant's evidence. The burden of proof which was thereby shifted to the defendant has not been met.

The inference, urged by the defendant, that the plaintiff had knowledge of the denial of the subject protest because of plaintiff's mistaken listing of the disputed entries herein as a part of a protest in a former action is, indeed, unsupported. In its motion to amend the summons to delete the entries in question which had been mistakenly listed, the plaintiff advised the court in February of 1980:

> Counsel was erroneously informed by the customs broker for the importer concerning the entries included in this protest. These entries, counsel has now learned, are included in Protest

No. 3801-9-000272, *which has not yet been acted upon by the Customs Service.*[3]

Contrary to the assertion of the defendant, the foregoing representation to the court corroborates plaintiff's claim that no notice of denial had been received by it.

In view of the facts which have been submitted to the court by way of affidavit in the instant proceedings, the court is satisfied that the summons was timely filed in the above action as it relates to protest No. 3801-9-000272.

Now therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the motion of the plaintiff is granted, and it is further

ORDERED, ADJUDGED and DECREED that the summons was timely filed in the above-entitled action as it relates to protest No. 3801-9-000272, and it is further

ORDERED, ADJUDGED and DECREED that the defendant's motion to sever said protest from the above action and to dismiss the above action as it relates to protest No. 3801-9-000272 be and is hereby denied.

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576 F. Supp. 630

THE WEST BEND CO., DIV. OF DART INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-10-01774

Before WATSON, *Judge.*

Opinion and Order on Motion To Dismiss Claim Under Generalized System of Preferences

Defendant's motion to dismiss a claim that plaintiff's importation was improperly deprived of eligibility for duty-free treatment under the Generalized System of Preferences is denied. The Court finds a legal defect in the President's action under 28 U.S.C. § 2464(c) sufficient to justify a possible remand.

[Motion to dismiss denied.]

(Decided November 3, 1983)

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Barbara M. Epstein,* attorney) for the defendant.

Barnes, Richardson & Colburn (Andrew P. Vance and *Michael A. Johnson* of counsel) for plaintiff.

WATSON, *Judge:* This decision deals with the government's motion to dismiss one of plaintiff's claims. The action itself covers hot-air corn poppers imported from Hong Kong between April 1, 1980 and March 31, 1981. The importations were classified as electrothermic household appliances under Item 684.20, dutiable at the rate of 8.1 percent ad valorem.[1]

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[3] Exhibit B—Plaintiff's Reply Memorandum in Support of Motion for Determination of Timeliness of Filing of Summons (emphasis added).

In addition to making claims for alternate clasifications, plaintiff has claimed that, if the importations are indeed properly classifiable under Item 684.20, then they should be free of duty under the Generalized System of Preferences (G.S.P.), created by Title V of the Trade Act of 1974 (19 U.S.C. §§ 2461 *et seq.*).

Defendant has moved to dismiss plaintiff's claim for duty-free treatment under the G.S.P. on the ground that the importations lost their right to that treatment by the action of the President in Executive Order No. 12204.[2] In Section 4, Annex IV of the Executive Order, Hong Kong was removed from eligibility for Item 684.20. The defendant asserts that the President's action was authorized both by the broad power given to him in 19 U.S.C. § 2464(a)[3] to affect duty-free treatment, and the specific authority set out in 19 U.S.C. § 2464(c)(1)(B)[4] which requires the loss of duty-

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[1] Schedule 6, Part 5, Subheading.

Electric instantaneous or storage water heaters and immersion heaters; electric soil heating apparatus, and electric space heating apparatus, electric hair dryers, hair curlers, and other electric hair dressing appliances; electric flatirons; electrothermic kitchen and household appliances; electric heating resistors other than those of carbon; all the foregoing and parts thereof:

Item 684.20 Toasters, waffle irons, skillets, ovens, stoves, coffee makers and other portable electrothermic kitchen and household appliances * * *

[2] 45 Fed. Reg. 20,740 (1980).

The pertinent part of the Order concerning the authority and intention of the President reads as follows: By virtue of the authority vested in me by the Constitution and statutes of the United States, including Title V of the Trade Act of 1974 (88 Stat. 2066, 19 U.S.C. § 2461, *et seq.)* as amended by Section 1111 of the Trade Agreements Act of 1979 (93 Stat. 315), section 604 of the Trade Act of 1974 (88 Stat. 2073, 19 U.S.C. § 2483) and Section 503(a)(2)(A) of the Trade Agreements Act of 1979 (93 Stat. 251), and as President of the United States of America, *in order to modify, as provided by Section 504(c) of the Trade Act of 1974 (88 Stat. 2070, 19 U.S.C. § 2464(c), the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries*, to adjust the original designation of eligible articles taking into account information and advice received in fulfillment of Section 503(a) and 131–134 of the Trade Act of 1974 (88 Stat. 2069, 19 U.S.C. § 2463; 88 Stat. 1994, 19 U.S.C. § 2151 *et seq.),* and to modify the designations of beneficiary developing countries in accord with my notifications to the Congress of September 28, 1979, and March 3, 1980, and in accord with technical changes in the identity of certain beneficiary developing countries, it is hereby ordered: [emphasis supplied]

* * * * * * *

[3] § 2464. *Limitations on preferential treatment.*

(a) *Withdrawal, suspension, or limitation of duty-free treatment.* The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 501 (19 U.S.C. § 2461) with respect to any article or with respect to any country; except that no rate of duty may be established in respect of any article pursuant to this section other than the rate which would apply but for this title (19 U.S.C. § 2461 *et seq.*; amendment to 19 U.S.C § 1202). In taking any action under this subsection, the President shall consider the factors set forth in sections 501 and 502(c) (19 U.S.C. §§ 2461 and 2462(c)).

* * * * * * *

[For text of 19 U.S.C. §§2461 and 2462(c) see note 6 *infra.*]

[4] § 2464. *Limitations on preferential treatment.*

* * * * * * *

(c) Designation, continuance of designation, or redesignation as beneficiary developing country notwithstanding increases in exports to United States. (1) Whenever the President determines that any country—

* * * * * * *

(B) except as provided in subsection (d), has exported (either directly or indirectly) to the United States a quantity of any eligible article equal to or exceeding 50 percent of the appraised value of the total imports of such article into the United States during any calendar year,

then, not later than 90 days after the close of such calendar year, such country shall not be treated as a beneficiary developing country with respect to such article, except that, if before such 90th day, the President determines and publishes in the Federal Register that, with respect to such country—

(i) there has been an historical preferential trade relationship between the United States and such country,

Continued

free treatment when importations of an eligible article equal or exceed 50 percent of the total value of annual importations of that article. (This will be referred to as the "50 percent limit.")

Defendant further asserts that neither the President's exercise of power under these provisions nor the findings he made are judicially reviewable.

Plaintiff argues that the President acted only under the 50 percent limit of 19 U.S.C. § 2464(c)(1)(B), and that 19 U.S.C. § 2464(d)[5] operates to exempt from the 50 percent limit those products which, on a certain date given in the law, were not in competition with products made in the United States. Plaintiff argues that the exemption takes those products entirely outside the exercise of the President's power to end preferred treatment under 19 U.S.C. 2464(c) and allows the question of whether or not the importations were competitive with U.S. products to be tried in Court in the same manner as a dispute about the product's classification or valuation.

It is the prospect of a trial on the issue of "competitiveness" which requires this motion to be disposed of prior to the alternative claims for classification even though, as a logical matter, a victory for plaintiff on an alternate claim could moot any disputes connected with classification under Item 684.20.

Plaintiff further argues that if indeed the President was empowered to make the competitive evaluation called for by § 2464(d) his evaluation was flawed by a misconception as to the meaning of the word "article," so that by considering "eligible articles" to be abstract tariff item numbers he could not possibly make the determination on the competitiveness of *individual* products which is contemplated by § 2464(d).

In this decision the Court defines the nature of its judicial review of the President's action, analyzes the statutory provisions, finds that the President acted only under the 50 percent limit, holds that he was required to make a finding on the subject of competitiveness under § 2464(d) and did not act in accordance with the law on that matter. The Court is led to deny the motion to dismiss and to conclude that remand for the purpose of the making of a proper determination under § 2464(d) will be the proper remedy if plaintiff's alternative claims for classification are not successful.

(ii) there is a treaty or trade agreement in force covering economic relations between such country and the United States, and

(iii) such country does not discriminate against, or impose unjustifiable or unreasonable barriers to, United States commerce,

then he may designate, or continue the designation of, such country as a beneficiary developing country with respect to such article.

* * * * * * *

[For text of the "subsection (d)" mentioned above see note 5 *infra.*]

[5] § 2464. *Limitation on preferential treatment.*

* * * * * * *

(d) *Domestic non-production of like or directly competitive articles.* Subsection (c)(1)(B) does not apply with respect to any eligible article if a like or directly competitive article is not produced on the date of enactment of this Act [enacted Jan. 3, 1975] in the United States.

* * * * * * *

To begin with, the Court explains why it limits its judicial review of the President's action to his authority under 19 U.S.C. § 2464(c) and the 50 percent limit.

In general, the statutory provisions for the G.S.P. display a considerable delegation of authority to the President in granting, withdrawing, suspending or limiting the duty-free treatment of eligible articles. In the course of the exercise of his authority the President has to take into account various considerations or make certain findings. It is well established that with respect to his exercise of discretion and the factual correctness of his underlying findings there is no judicial review. *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940). Nevertheless, judicial review is available to determine whether the President's action was in conformity with the law. This includes such questions as whether he acted within his authority, whether he acted with a correct understanding of the language of the law, and whether he acted in conformity with its procedures.

In this case, the Court does not examine the President's action in terms of his authority under § 2464(a) because he did not specifically refer to that provision. This is not simply a glorification of a technical recitation of authority. The two sources of authority available to the President differ completely in substance and procedure. The exercise of power under § 2464(a) is a voluntary action by the President which requires the consideration of the diverse and delicate factors set out in 19 U.S.C. § 2461 and 2462(c).[6]

The discretionary authority of § 2464(a) is not a source of authority which can be presumed to have been used in the face of a specific recitation of § 2464(c). The latter is a completely different species of authority. Under it, the President is *compelled* to act by reason of the occurrence of objectively measured events (in this case, the reaching of the 50 percent limit), unless he makes certain determinations described in § 2464(c)(1) (i), (ii) and (iii).[7] He must also take into consideration the provision in § 2464(d) exempting non-competitive articles and make that determination.[8]

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[6] § 2461. *Authority to extend preference.*

The President may provide duty-free treatment for any eligible article from any beneficiary developing country in accordance with the provisions of this title (19 U.S.C. § 2461 *et seq.*; amendments to 19 U.S.C. § 1202). In taking any such action, the president shall have due regard for—

(1) the effect such action will have on furthering the economic development of developing countries;

(2) the extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries; and

(3) the anticipated impact of such action on United States producers of like or directly competitive products.

§ 2462. *Beneficiary developing country.*

* * * * * * *

(c) *Factors determinative of whether to designate country as beneficiary developing country.* In determining whether to designate any country a beneficiary developing country under this section, the President shall take into account—

(1) an expression by such country of its desire to be so designated;

(2) the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) whether or not the other major developed countries are extending generalized preferential tariff treatment to such country; and

(4) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country.

[7] See note 4 *supra.*

When the President recites § 2464(c) as the specific source of his action he is indicating that he acted under compulsion and therefore had to make a determination of whether any articles should be exempt from the force of that compulsion. It would be entirely presumptuous for the Court to take this specific recitation of authority and change it to an unspecified source of authority which indicates a willful action by the President and presumes that a different and difficult set of considerations have been taken into account.

All this differs from those cases in which the President's acts and his supporting findings and procedures are the same regardless of the authority relied on. In those events it may be possible for Courts to seek out alternative, unspecified sources of authority because the action of the President, as well as his findings and procedures, will remain the same. This important point distinguishes this case from those in which alternative sources of authority have been approved. See, for example, *Yoshida Int'l., Inc.* v. *United States,* 63 CCPA 15, C.A.D. 1160; 526 F2d 560 (1975).

This case is also distinguishable from the recent case of *Florsheim Shoe Co.* v. *United States,* 6 CIT 1 (1983) (appeal pending) in which an action challenging the removal of articles from the G.S.P. was dismissed for failure to state a claim. In that action the President had relied on *both* § 2464(a) and § 2464(c), in which case the broad authority of the former was sufficient to cure any possible defect in the exercise of the latter authority. In fact, the use of both authorities has the appearance of unnecessary duplication because § 2464(a) alone is certainly sufficient to remove an eligible article. In any event, it hardly makes sense for this Court to presume in this case that the President, without saying so, would use duplicative authority, particularly when its use involves alternative considerations and procedures.

Within § 2464(c) there is no dispute that the President acted pursuant to the 50 percent limit expressed in § 2464(c)(1)(B). This leads to the main question concerning the legal and procedural correctness of his action.

The dispute between the parties centers on the meaning of the word "articles" in the law of the G.S.P. The government argues that it always means "Tariff item" (which may encompass a multitude of separate products). The government's interpretation of the term as a tariff item number is not in dispute when it comes to granting duty-free treatment to "any eligible article" or determining whether "a quantity of any eligible article" has reached the 50 percent limit. This definition, however, cannot hold true when the law states that the 50 percent limit does not apply with respect to an "eligible article" if a competitive "article" is not produced in the United States. At that point it is impossible to think that the law is talking of tariff item numbers which contain disparate groups of products. It is clear and eminently reasonable that Congress did not want to have *individual* products removed from preferential treatment by means of the 50 percent limit if they were not competitive with American products.

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[8] Here the Court indicates that the exemption in § 2464(d) is part of the Presidential determination. A complete exemption which is determined only in administrative or judicial proceedings after entry is simply incongruous and leaves the actions of the President affecting eligible articles too imprecise and too dependent on later events to be reasonably intended by Congress. Although separately stated, the Court sees the exemption expressed in § 2464(d) as a necessary part of the President's exercise of power in his administration of the G.S.P. From this it follows that the finding of whether or not articles are competitive is not a subject for trial. On this point plaintiff must accept the factual finding of the President if it is made with a correct understanding of the law.

The legislative history is not particularly helpful on this point. An interesting passage in the Senate Report on the Trade Reform Act of 1974 speaks of the terms article as "in general" referring to tariff item numbers but goes on to mention the making of exceptions to insure "that an article is a coherent product category." [9] This is certainly not a justification for maintaining an equivalence between eligible articles and item numbers when it produces absurdities, as it would in § 2464(d). There is yet another statutory provision in which the concept of an "article" as an item number (containing disparate products) would not make sense. That provision is § 2463(b) which sets out the portions of the value of the eligible article which must be attributable to the eligible country in order for the "article" to obtain duty-free treatment.[10] In short, it is plain that the word "article" must take on such meaning as is reasonable and in accordance with legislative intention in the context of each separate provision. It necessarily follows that the term can mean different things in different parts of the G.S.P. law.

The extent to which "article" may mean other things elsewhere in the Act is not controlling here. In § 2464(d) it *must* mean an individual product. The identity of "article" and "item number" cannot be maintained when it comes to deciding whether or not articles were competing, unless, of course, an item number covers only one distinct product.

That was the situation in *Florsheim Shoe Co.* v. *United States, supra,* when, *inter alia,* buffalo leather from India was excluded from duty-free treatment under the G.S.P. In that event a single product, buffalo leather, was the entire content of a single item number (Item 121.55). Consequently, it could be presumed that, even though the exclusion was done by item number, the President had found the single product involved was competitive with an American product and therefore, to the extent that it had reached the 50 percent limit, it could not remain on the G.S.P. by virtue of § 2464(d).

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[9] S. Rep. No. 93-1298, 93rd Cong. 2d Sess. pp. 223-226.

[10] § 2463. *Eligible articles.*

* * * * * * *

(b) *Eligible articles qualifying for duty-free treatment.* The duty-free treatment provided under section 501 (19 U.S.C. § 2461) with respect to any eligible article shall apply only—

(1) to an article which is imported directly from a beneficiary developing country into the customs territory of the United States; and

(2) If the sum of (A) the cost or value of the materials produced in the beneficiary developing country or any 2 or more countries which are members of the same association of countries which is treated as one country under section 502(a)(3) (19 U.S.C. § 2462(a)(3)), plus (B) the direct costs of processing operations performed in such beneficiary developing country or such member countries is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.

Here, with the exclusion of an item number containing on its face a variety of separate products, it is clear that a determination as to the competitive status of individual products was not made. Whatever may be the plasticity of the term "article" elsewhere in the administration of the G.S.P., it cannot justify or support an impossible comparison of competition either between tariff item numbers or disparate groups of products.

This holding by the Court constitutes a finding of procedural irregularity in the removal from eligibility of the Item in which the corn poppers were classified. The irregularity resulted from a misinterpretation of the term "article" as used in 19 U.S.C. § 2464(d). Aside from requiring the denial of defendant's motion to dismiss, the Court is of the opinion that the appropriate remedy for the defect it has found in the Presidential action is to remand for the purpose of allowing the correct procedures to be followed with respect to these corn poppers. However, since further steps consistent with classification under Item 684.20 would be pointless if plaintiff's claims for alternative classifications are correct, those alternative classifications must first be considered. Consequently, plaintiff must decide if it wishes to pursue its alternative claims. If it does, the Court will try the issues raised by those claims. If those are decided adversely to plaintiff, or if the plaintiff chooses not to proceed as to those claims, the case will be remanded so that the President may make findings under 19 U.S.C. § 2464(d) in conformity with this opinion.

It should be noted that those findings will not subsequently be judicially reviewable other than for their procedural regularity and conformity to the law.

For the reasons given above defendant's motion to dismiss is **Denied**, and it is further

Ordered that plaintiff shall notify the Court within 20 days of the date of entry of this Order of its intentions regarding its alternative claims.

578 F. Supp. 414

United States Steel Corporation, Republic Steel Corporation, et al., plaintiffs *v.* **United States of America, et al., defendants, and Companhia Siderurgica Paulista, et al., defendants-intervenors**

Consolidated Court No. 82-10-01361

United States Steel Corporation, Republic Steel Corporation, et al., plaintiffs *v.* **United States of America, et al., defendants**

Consolidated Court No. 82-12-01707

Before Watson, *Judge.*

Memorandum Opinion and Order

(Dated November 3, 1983)

Watson, *Judge:* In this opinion the Court rules on a number of procedural motions of more than passing interest.

Plaintiffs have moved to have the briefs which they have filed, or will file, in Court No. 82-10-01361 (in connection with the issues arising from the *preliminary* determination of the International Trade Administration of the Department of Commerce (ITA) on certain carbon steel products from Brazil) utilized for judicial review under Rule 56.1 of the same issues as they arise from the *final* Brazil determination (the challenge to which, originally begun in Court No. 83-01-00152, was later consolidated with Court No. 82-10-01361). In the separate briefing which is underway in Court No. 82-10-01361 these issues have been termed "creditworthiness," "equity infusions," "valuation methodologies," and "time periods" (alleged disregard of current information).

The government has no objection to this procedure and the Court approves it.

The plaintiffs have also asked that their briefs in Court No. 82-10-01361 on the subject of "valuation methodologies" and "time periods" be utilized for review under Rule 56.1 in Court No. 82-12-01707, brought to contest a final subsidy determination involving steel from Spain. There appears to be no dispute that the issues of "valuation methodologies" and "time periods" are also involved in that case.

The government does not dispute the identity of issues in these cases but opposes the motion, terming it a disguised attempt to achieve consolidation. (In Slip Op. 83-65 (June 28, 1983) the Court rejected the consolidation of Court No. 82-12-01707 (Spain) and 82-10-01361 in the course of dealing with a raft of procedural matters.)

The government proposes instead that Court No. 82-12-01707 be suspended pending the resolution of Court No. 82-10-01361, in order to avoid unnecessary filing of repetitious briefs and in order to possibly have the issues narrowed by the result in Court No. 82-10-01361.

Absent a more concrete enhancement of the disposition of the action in Court No. 82-12-01707, the Court is loath to suspend cases which have been given a statutory priority in 28 U.S.C. § 2647(4). For this reason, defendant's proposal is rejected and its cross-motion to suspend is Denied.

Although plaintiffs' proposal does seem to be one way of moving more rapidly toward disposition of Court No. 82-12-01707, it now appears to the Court to be unnecessarily complicated and inferior to straightforward consolidation. The Court's earlier refusal to consolidate in Slip Op. 83-65 *supra*, came about more from preoccupation with a motion to dismiss than a definite conclusion that consolidation was inappróprite. At the present time the Court sees an identity of two issues and a prospect of speedy and efficient dispositon, which make consolidaton the best alternative. If at some point, the introduction of Spain into Court No. 82-10-01361 requires some adjustment to the future briefing schedule, the timing can be altered somewhat, but the movement towards disposition will still be more efficient than if the actions were kept apart.

For the reasons stated, it is hereby

Ordered that Court No. 82-12-01707 be consolidated with Court No. 82-10-01361, which action shall proceed under the latter number without the need for further pleadings and it is further

Ordered that all issues in the consolidated action may be submitted for review under Rule 56.1. All briefs previously submitted shall be considered as filed for the issues now contained in the action to the extent that they relate to those issues. All further briefing shall be on the same schedule and terms as has been established.

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576 F. Supp. 636

Samuel Katunich, Jane H. M. Rigo and Guy Serra, plaintiffs *v.* Raymond J. Donovan, Secretary of Labor, United States Department of Labor, defendant

Court No. 81-9-01158

Before Re, *Chief Judge.*

Memorandum and Order

(Dated November 3, 1983)

Re, *Chief Judge:* In this action, plaintiffs, on behalf of the former employees of U.S. Steel's Monroeville Research Laboratory, challenge the Secretary of Labor's denial of certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1967 & Supp. IV 1980).

Plaintiffs move for an order allowing access to all confidential information contained in the administrative record herein, and defendant cross-moves for a protective order barring any disclosure.

The Secretary of Labor denied plaintiffs' certification because they failed to satisfy the third eligibility criterion of section 222 of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1976). The Secretary's investigation disclosed that plaintiffs were engaged in activities related to the production of steel. Nevertheless, they could only obtain certification if their separation from employment "was caused importantly by a reduction for their services originating at facilities whose worker's independently meet the statutory criteria * * * and that reduction must be directly related to the product impacted by imports." 46 Fed. Reg. 35825 (1981). Since the Secretary found that production at other U.S. Steel facilities was not adversely affected by imports, he concluded that plaintiffs' separation was not caused by a deadline in production at those plants whose workers independently met the criterion of section 222(3). Therefore, certification was denied, and plaintiffs brought this action.

In an earlier opinion, *Katunich* v. *Donovan,* 5 CIT 274 (1983), the court first considered plaintiffs' motion for discovery and defendant's cross-motion. After reviewing the administrative record and finding it incomplete as to the factual basis for the Secretary's determination, the court withheld decision on the motions and remanded the case to the Secretary for the purpose of furnishing a more complete record. The Secretary has complied with the remand order, and the court may now consider the discovery request.

The information in question consists of the following: (1) a description of the functions and responsibilities of the Executive Offices of U.S. Steel; (2) data regarding the number of employees, layoffs, recalls and terminations at U.S. Steel's Executive Offices and research lab; and (3) the tonnage produced by various U.S. Steel facilities, the subject of other trade adjustment assistance investigations.

Plaintiffs contend that they seek disclosure of the confidential information to assist them with their case in chief, and to determine "whether the sealed information correctly reflects the true employee and production data at U.S. Steel Corporation for the period in question."

Defendant maintains that (1) plaintiffs have failed to state the nature of the information required, and in what respect it is essential for the prosecution of plaintiffs' case; (2) even under a protective order, the release of confidential business data to *pro se* parties, who are not bound by the rules of professional responsibility and conduct applicable to attorneys, may well discourage cooperations by businesses and others whose participation in the Secretary's investigation is essential; and (3) there would be difficulty in fashioning a protective order allowing *pro se* parties access to confidential information, and, at the same time, ensuring that the confidential information would not be disseminated in violation of the court's order.

Defendant further contends that plaintiffs had an opportunity to present facts in support of their petition at the administrative level, yet failed to exercise that right. Thus, defendant maintains that discovery is inappropriate at this stage of the proceeding for the purpose of refuting or supplementing the data in the administrative record. Moreover, defendant views discovery as inappropriate since the court is required by law to review the Secretary's determination on the basis of whether that determination is supported by substantial evidence as contained in the administrative record. 19 U.S.C. § 2395 (Supp. IV 1980).

Plaintiffs assert that their lack of formal legal training should not be a barrier to obtaining equal treatment before the law. Plaintiffs state that they would abide by any strictures or restraints imposed upon them to assure confidentiality of the information. Plaintiffs also submit that their ability to proceed, and ultimately their eligibility for adjustment assistance benefits, should not be prejudiced by the lack of any information that may have served as a basis for the Secretary's denial of certification of eligibility.

In exercising its discretion to release confidential information, the court must consider the need of plaintiffs for data in the prosecution of their case as well as the need of the Secretary to obtain confidential business information for future administrative proceedings. *American Spring Wire Corp.* v. *United States,* 5 CIT 256, 566 F. Supp. 1538 (1983). In every case, the party seeking disclosure must establish that the information sought is sufficiently relevant and necessary to the case to outweigh the potential harm of disclosure to the party from whom the information is sought. *Bruno & Stillman, Inc.,* v. *Globe Newspaper Co.,* 633 F.2d 583, 597 (1st Cir. 1980). *Hartley Pen Co.* v. *U.S. Dist. Court for So. Dist. of Calif.* 287 F.2d 324, 331 (9th Cir. (1961)). *See 8 C. Wright & A. Miller, Federal Practice & Procedure,* § 2043, at 301-302 (1970). Finally, the court must balance plaintiffs' need for disclosure against the need of the government in the public interest to maintain confidentiality. *Nakajima All Co.* v. *United States,* 2 CIT 170, 174 (1981).

Of course, it is basic that each case turns on its own particular facts and circumstances. *See American Spring Wire Corp.* and cases cited therein, 566 F. Supp. at 1540. Moreover, prior to deciding whether to permit disclosure of confidential business information, the court may make an *in camera* inspection of the requested documents to determine their relevance. *See Besly-Welles Corp.* v. *Balax, Inc.,* 43 F.R.D. 368 (D.C. Wis. 1968).

The court has made an *in camera* examination of the documents in question, and has considered the competing needs of the parties and the public interest. As a result of this examination, the court grants plaintiffs' motion for disclosure but only as to the employee and production data contained on pages 162–168 and 213–215 of the administrative record, and subject to the terms and conditions of the court's protective order. Accordingly, defendant's cross-motion barring disclosure is denied.

The court has also concluded that the description of the functions and responsibilities of the Executive Offices of U.S. Steel, appearing on page 162 of the record, bears little relevance to the Secretary's denial of certification. Therefore, plaintiffs are not entitled to access to that portion of the confidential administrative record.

The court fully appreciates the need to encourage the submission of business information, confidential and nonconfidential, to enable the Secretary of Labor properly to administer the worker adjustment assistance program. The court is also aware of the potential harm to those businesses that submit confidential information if that information were to be made public. Nevertheless, the court is equally sensitive to the need of a party particularly a *pro se* litigant, "to fully prepare and present its legally authorized challenge to an administrative determination and to do so based on all available relevant material." *Connors Steel Co.* v. *United States*, 85 Cust. Ct. 112, 113, C.R.D. 80–9 (1980).

As to the relevance of the information sought to be disclosed, there is no doubt that employee and production data are essential to the Secretary's determination to certify a group of workers as eligible for trade adjustment assistance benefits. Without access to that data, the court is unable to see how plaintiffs can evaluate the basis of the Secretary's determination and present effective arguments designed to show that determination is not supported by substantial evidence. For the court to require plaintiffs to proceed blindly would inhibit the fair and just adjudication of the issues.

Furthermore, the employment and production data covers the period of January 1978 through August 1980. In view of the age of the data, the potential harm to U.S. Steel from disclosure and "any sensitivity previously possessed by this data has become *de minimis*." *Japan Exlan Co.* v. *United States*, 1 CIT 286, 288 (1980). Finally, the court rejects defendant's contention that disclosure should be denied because plaintiffs failed to state a particularized need for the confidential information. For the court to require the specificity sought by defendant would, in effect, require the court to prejudge "the existence of substantial evidence" for the Secretary's denial of certification. "Aside from demanding impossible prescience from the plaintiffs such an inquiry would result in a distorted and piecemeal judicial review." *Atlantic Sugar Ltd.* v. *United States*, 85 Cust. Ct. 128, 129, C.R.D. 80–14 (1980).

For the above reasons, it is hereby

ORDERED, that defendant's cross-motion barring disclosure is denied; and plaintiffs' motion for disclosure is granted, subject to the following terms:

1. All confidential employment and production data contained on pages 162 through 168 and 213 through 215 of the administrative record, transmitted to the court in connection with this action, shall be available to plaintiffs for examination and copying at the Office of the Clerk of this court during the business days of the 30-day period commencing on the date of entry of this order;

2. Plaintiffs shall not disclose this confidential information to anyone other than an expert permitted under paragraph 4 of this order;

3. Plaintiffs or any expert permitted under paragraph 4 of this order shall not use this confidential information for purposes other than this litigation or any remand or appeal of this matter;

4. Should plaintiffs consider the services of an expert necessary to the preparation of their case in this litigation, and the expert's services require the use of the confidential information in question, the plaintiffs shall, prior to providing confidential information to an expert, notify counsel for defendant of their desire to retain an expert and shall provide counsel for defendant with: (1) the *curriculum vitae* of the proposed expert; (2) a description of the measures for safeguarding the confidential information to be made available to the proposed expert; (3) a signed statement from the expert submitting himself or herself to the jurisdiction of the Court of International Trade and such reasonable sanctions as this court may deem appropriate in the event of a breach of the conditions of this order; and (4) a certification that the proposed expert is independent of the steel industry. No later than ten days from the date of receipt of the above-described information, defendant shall either consent to the use of the expert proposed by plaintiffs or indicate his objections in writing. If the parties are unable to agree upon an acceptable expert within ten days, plaintiffs may file an appropriate motion with the court;

5. Plaintiffs shall not make more than five (5) copies of any page of the confidential portion of the administrative record and shall maintain a record of any and all copies of confidential information made, to whom they were provided and when they are returned. All such copies shall be clearly marked as containing confidential information and that they are to be returned at the conclusion of this litigation;

6. Whenever any confidential portion of the administrative record subject to this protective order is not being used, it shall be stored in a locked vault, safe, safety deposit box, or other suitable container, in a designated location mutually agreed upon by plaintiffs and counsel for defendant. Plaintiffs shall inform the court in writing of the location;

7. Any documents, including briefs and memoranda, containing any of the confidential information subject to this order, which are filed with the court in this case or used for any other purpose, shall be conspicuously marked as containing information which is not to

be disclosed to the public and arrangements shall be made with the Clerk of this court to retain those documents under seal, permitting access only to the court, court personnel authorized by the court to have access, plaintiffs and counsel for the defendant. Copies of all the foregoing documents, but with the confidential information deleted, shall be filed with the court at the same time that the documents containing the confidential information are filed;

8. Any briefs or memoranda containing confidential information shall be served on the other parties in a wrapper conspicuously marked on the front "Confidential—to be opened only by plaintiffs and counsel for the defendant," and shall be accompanied by a separate copy from which the confidential information has been deleted;

9. Upon the conclusion of this litigation and any appeal or remand of this matter, plaintiffs shall return all copies of the confidential portion of the administrative record, including copies held by persons authorized under this order to have access thereto. The return of those copies shall be accompanied by a certificate executed by plaintiffs attesting to the fact that the provisions of this paragraph have been complied with in all respects; and

10. Plaintiffs or counsel for defendant shall promptly report any breach of the provisions of this order to the court.

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576 F. Supp. 641

ITT SEMICONDUCTORS, PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 80-9-01521

Before CARMAN, *Judge.*

Memorandum

[Motion to dismiss granted.]

(Dated November 3, 1983)

Barnes, Richardson & Colburn (Rufus Jarman, on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Deborah Rand* on the motion) for the defendant.

CARMAN, *Judge:* This matter is before me on the parties' cross-motions for summary judgment and defendant's alternative motion to dismiss.

Plaintiff commenced this suit to recover the sum of $48,153.04 which was paid to the defendant as part of an overall settlement of a penalty action. Plaintiff filed a protest with respect to the payment of this sum and it was denied as being a decision that was not protestable. Defendant moves to dismiss arguing that since the decision as to which the protest was filed was not a protestable decision pursuant to 19 U.S.C. § 1514 (1976 & Supp. IV 1980), this court lacks subject matter jurisdiction in this matter. After a recitation of the background facts, as alleged by the plaintiff, this threshold jurisdictional question will be addressed.

Plaintiff is the importer of record of numerous entries of transistors exported from Portugal and other countries which entered into the United States during the years 1969 through 1974. Approximately sixty-two of these entries imported in 1969 and 1970 are the subject of this suit. These transistors were manufactured using certain U.S. components called "dice," for which plaintiff claimed and was granted an allowance of duty under TSUS item 807.00. An amended prepenalty notice was issued to ITT Semiconductors ("ITT") by the United States on June 9, 1976, advising that the United States was contemplating the assessment of penalties in the amount of $60,470,322.00. The notice covered 805 consumption entries filed between July 23, 1969 and November 15, 1974.

The notice alleged that foreign assemblers had commingled foreign and domestic components in the manufacture of the transistors making such components ineligible for duty allowance under TSUS item 807.00, and that, regardless of the country of origin, dice components were not entitled to item 807.00 treatment because they were separated after importation by the "scribe and break" technique. The notice alleged that by claiming an item 807.00 allowance for dice components under such circumstances, plaintiff had violated the provisions of 19 U.S.C. § 1959. Other allegations appeared in the notice relating to entries not covered by this litigation. The Customs Service subsequently issued a Notice of Penalty in the amount of $12,649,099.00. The notice reflected the deletion of a considerable number of entries based upon a decision in *United States* v. *Texas Instruments Inc.,* 64 CCPA 24, C.A.D. 1178, 545 F.2d 739 (1976). An amended Notice of Penalty dated March 21, 1978 reduced the amount to $10,118,474.00.

On July 7, 1978, plaintiff filed a Petition for Mitigation pursuant to 19 U.S.C. § 1618 [1] and in this petition addressed the inclusion of the entries that are the subject of this action. Plaintiff believes that these entries had been included in the prepenalty and penalty notices because of the discredited position of the Customs Service that an allowance under item 807.00 could not be made for the U.S. components subject to a "scribe and break" separation. The intervening decision in *United States* v. *Texas Instruments, supra,* determined that such separation did not disqualify the U.S. components from receiving an allowance of duty under item 807.00.

On April 18, 1979, the Customs Service responded to plaintiff's Petition for Mitigation, and noting the *Texas Instruments* decision changed its position that an item 807.00 claim could not have been allowed on the subject entries. The Customs Service, however, requested payment of "withheld duties" for the subject entries in the amount of $48,153.04.

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[1] 19 U.S.C. § 1618 (1976) provides in part:

> [T]he Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.* * *

Plaintiff filed its First Supplemental Petition for Mitigation on September 13, 1979, arguing that since the Customs Service had concluded that plaintiff had reasonable cause to believe that the components included in the subject entries were of U.S. origin, plaintiff should not be required to pay "withheld duties" on the entries as demanded in the April 18 Customs Service letter.

On September 27, 1979, the Customs Service responded to plaintiff's First Supplemental Petition stating, in a letter by the District Director of Customs at Miami, as follows:

> We wish to point out that in our prior decision we did not find that the dice were products of United States origin; rather, we found that ITT had reasonable cause to believe that the transistors imported from Standard Electrica were assembled from dice produced in the United States. Therefore, the loss of revenue attributable to the item 807.00 claims for dice were not included in the determination of the mitigated amount. Nevertheless, the mitigated amount was conditioned upon the payment of the actual loss of $48,153.04, because ITT failed to supply documentation that all of the dice used in the assembly of the transistors were produced in the United States. * * *

Plaintiff's Appendix G, at 2.

The Customs Service mitigated the claim for forfeiture value to $289,662.00 with the provision that the actual loss of revenue of $153,412.00 also be deposited. Customs further advised that if the amounts of $289,662.00 and $153,412.00 were not paid by plaintiff, a claim for forfeiture value in the amount of $10,118,474.00 would be referred to the United States Attorney. Plaintiff paid the amount requested by Customs by October 4, 1979.[2]

Plaintiff filed a Second Supplemental Petition for Mitigation on November 7, 1979, offering to supply additional proof in the form of sworn testimony or otherwise, to establish to the Customs Service's satisfaction that the dice included in the transistors covered by the subject entries were of U.S. origin. This Second Supplemental Petition noted that plaintiff regarded the demand for $48,153.04 as "withheld duties" and as a retroactive assessment of duties in violation of section 514 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1514, and requested a refund of these duties.

Plaintiff argued that it paid the full amount demanded by the Customs Service in its mitigation offer only to avoid referral to the United States Attorney and the institution of a claim for forfeiture value in excess of ten million dollars. Plaintiff contended that since no violation of 19 U.S.C. § 1592 had been found with respect to the approximately sixty-two entries imported in 1969 and 1970 that were the subject of the suit, the Customs Service had no right to require payment of withheld duties on these entries as a condition of mitigating the claims for forfeiture value with respect to other entries.

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[2] Although the full amount was paid by the plaintiff, the payment was not submitted by means of one check. Among the checks submitted to total the full amount, a check in the amount of $48,153.04 was submitted.

The Customs Service responded on January 17, 1980 to the Second Supplemental Petition by refusing to refund the amount of $48,153.04 and advised that no further petition would be considered. By letter dated January 29, 1980, the District Director at Miami forwarded a copy of this last letter in which it noted that it was attaching a copy of the final decision rendered by the Customs Service.

Plaintiff mailed a protest to the District Director at Miami on December 21, 1979, which was marked received by the Customs Service on December 27, 1979. However, the protest was returned by the Customs Service at the port of West Palm Beach, Florida, on or about February 28, 1980 with the explanation: "This matter is not subject to protest." Plaintiff wrote to the Customs Service on March 27, 1980, returning the protest. It was subsequently denied on April 3, 1980, on the grounds that the issue was not subject to protest. Suit was commenced in this court on September 25, 1980. Oral argument was duly held on the parties' cross-motions for summary judgment and defendant's alternative motion to dismiss.

For this court to have subject matter jurisdiction in this case, the plaintiff must have filed a timely protest pursuant to 28 U.S.C. § 1581(a) (Supp. V 1981).[3] Although a protest was filed in this case, the question is whether or not the decision which the plaintiff protested was one that was protestable at all.

Plaintiff asserts that the payment of "withheld duties" with regard to the sixty-two entries in question was made under duress and therefore was a "charge or exaction" protestable under 19 U.S.C. § 1514(a)(3).[4] It is the position of the plaintiff that the payment of $48,153.04 was a charge or exaction because there was no avenue for avoiding the threatened lawsuit for forfeiture value except by depositing the monies demanded by the government.

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[3] 28 U.S.C. § 1581(a) (Supp. B 1981) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[4] 19 U.S.C. § 1514(a)(3) (1976) & Supp. IV 1980) provides:

> Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties as defined in section 1677 (9) (C), (D), and (E) of this title), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
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> (3) All charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
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> * * * * * * *
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> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordane with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title. When a judgement or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the appropriate customs officer, who shall take action accordingly.

Plaintiff argues that absent an alternative to the mitigation procedure the payment tendered was made under coercion and compulsion. This court cannot agree with plaintiff's position.

As the defendant points out, the monies paid were part of a settlement in mitigation of penalties assessed upon the entries that are the subject of this action and upon numerous other entries not before this court. Plaintiff voluntarily paid the monies in issue as part of a settlement it requested and negotiated. The plaintiff was free at any time during negotiations with the defendant to decline settlement. Had the plaintiff refused settlement, the defendant, as in any case, could have pursued its legal remedies. It can hardly be argued that the pursuit by the defendant of its legal remedies is tantamount to coercion.

Plaintiff has attempted to separate certain entries from the entire settlement because it believed the defendant's position was weak with respect to those entries. However, the sixty-two entries that are the subject of this litigation are part of 805 entries considered in the potential penalty case as well as in the offer by the defendant to settle. There is no indication in the record that the offer to settle, or the final settlement, was severable. The Customs Service accepted plaintiff's payment and in exchange agreed to forego suit for the entire penalty amount. Since plaintiff chose to pay the amount in dispute as an alternative to being sued, this court does not find the defendant compelled payment or that payment was made involuntarily.

In *Carlingswitch, Inc.* v. *United States,* 85 Cust. Ct. 63, C.D. 4873, 500 F. Supp. 223 (1980), *aff'd,* 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981) (Carlingswitch I), the court discussed whether or not a payment to the Customs Service was voluntary or involuntary and whether or not a "charge or exaction" existed as set forth in 19 U.S.C. § 1514. The plaintiff in *Carlingswitch I* tendered approximately $92,000.00 to the government in connection with a penalty investigation under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592, for understating the value of certain shipments of switches, indicator lights and related products. The Customs Service subsequently issued a penalty notice to the plaintiff, and then approximately 18 months later notified the plaintiff that it was remitting the forfeiture claim in full because the claim was barred by the running of the statute of limitations. Plaintiff then filed a protest requesting a refund of the tender, was denied, and suit was instituted in the Customs Court. Plaintifff's argument in *Carlingswitch I* was that by virtue of 19 U.S.C. §§ 1520(a)(3) [5] and

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[5] 19 U.S.C. § 1520(a)(3) (1976) provides in part:
The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

* * * * * * *

Fines, penalties, and forfeitures.—Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or is remitted.

1514(a)(3),[6] the Customs Service's refusal to refund monies paid in satisfaction of duties amounted to a "charge or exaction" within the meaning of 19 U.S.C. § 1514(a)(3) and jurisdiction existed under 28 U.S.C. § 1582(a)(3).[7] The Customs Court rejected this argument by the plaintiff and found that 28 U.S.C. § 1582(a)(3) did not confer jurisdiction.

The Customs Court in *Carlingswitch I* determined, and the Court of Customs and Patent Appeals (CCPA) affirmed, that neither an importer's voluntary tender of approximately $92,000.00 to the Customs Service in connection with a penalty investigation for understating the value of certain shipments, nor the Customs Service's subsequent refusal to refund the monies tendered, was an "exaction" for purposes of establishing jurisdiction over an importer's action to recover the voluntarily tendered funds. It was stated by Judge Maletz that the tender was made by the plaintiff "on its own initiative and without request or demand by Customs in order to limit its potential penalty liability by complying with the "voluntary disclosure" practice of Customs." 85 Cust. Ct. at 65, 500 F. Supp. at 226.

In evaluating whether a charge or exaction existed pursuant to 19 U.S.C. § 1514, the court in *Carlingswitch I* looked to the plain meaning of the word "exaction", and noted definitions from The Random House Dictionary, Webster's Dictionary, and Black's Law Dictionary. The court concluded with the aid of these definitions that "[a]t the very least, to constitute an "exaction" under section 514(a)(3), there would have had to have been some compulsion on the part of Customs requiring plaintiff to have paid the monies." 85 Cust. Ct. at 66, 500 F. Supp. at 227.

In the case at hand, the amount paid by ITT was a settlement amount arrived at and agreed upon by the parties. It was not in and of itself a fine, penalty or forfeiture and was voluntarily paid by the plaintiff in order to avoid suit by the United States. Plaintiff argues that *Carlingswitch I* is easily distinguishable from the case at hand because this case does not involve a protest against a refusal to refund an amount deposited pursuant to 19 U.S.C. § 1520(a)(3) and does not deal with a voluntary tender prior to the issuance of a penalty notice. This court does not find these distinctions determinative. *Carlingswitch I* is helpful in defining what is a "charge or exaction" within the meaning of 19 U.S.C. § 1514(a)(3) and the parameters of voluntariness in this context.

In the instant case, the record is replete with facts that demonstrate voluntary behavior. The mitigation proceedings, during which plaintiff was always represented by counsel, lasted over 1 year with plaintiff submitting many petitions. More importantly, plaintiff, as the result of these petitions, was successful in achieving many significant reductions in the penalties assessed. Plaintiff was only advised that the negotiations were about to come to a close when defendant was about to lose its right to sue due to the running of the statute of limitations.

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[6] *See supra* note 4.

[7] 28 U.S.C. § 1582(a)(3) (1976) (amended 1980) provides in part:

> (a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: * * * all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; * * *.

As Judge Maletz noted in *Carlingswitch, Inc.* v. *United States,* 5 CIT 70, 560 F. Supp. 46 (1983), *appeal docketed,* No. 83-871 (Fed. Cir. March 14, 1983) (Carlingswitch II),[8] "[i]n order for such payments to be truly voluntary, they must be done 'by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will.' " 5 CIT at 74, 560 F. Supp. at 49 (quoting *Smith* v. *Noble Drilling Co.,* 272 F. Supp. 321, 322 (E.D. La. 1967), *aff'd,* 412 F.2d 952 (5th Cir. 1969)). Since payment in the case at hand was a means of mitigating a claim and optional on the part of the parties, this court can only conclude that the decision to pay the settlement amount was by the exercise of free will and not by compulsion on the part of the defendant.

Having determined that the plaintiff in this case acted voluntarily and without compulsion from the Customs Service, a charge or exaction cannot be said to exist under 19 U.S.C. § 1514(a)(3) for purposes of establishing subject matter jurisdiction in this court. Therefore, although a protest was filed in this case, the protest was inappropriate because the settlement decision was not a protestable decision, and jurisdiction cannot be said to exist under 28 U.S.C. § 1581(a).

Finally, plaintiff has asserted, at a late point in the litigation and seemingly as an afterthought, that if this court does not have jurisdiction under 28 U.S.C. § 1581(a), it must have jurisdiction under 28 U.S.C. § 1581(i) (Supp. V 1981).[9] This court is not persuaded that this is the case. The theory that 28 U.S.C. § 1581(i) can be used to create a cause of action where one does not otherwise exist has been repeatedly rejected. *See United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467, 472 (1982); *Montgomery Ward & Co.,* v. *Zenith Radio Corp.,* 69 CCPA 96, 673 F.2d 1254, 1261 (1982). While pursuant to 28 U.S.C. § 1581(i)(4) this court has jurisdiction over the administration and enforcement with respect to matters referred to in paragraphs (1)–(3) and subsections (a)–(h) of 28 U.S.C. § 1581, plaintiff has failed to demonstrate why this court should exercise such jurisdiction in this case.

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[8] *Carlingswitch II* is identical in subject matter to *Carlingswitch I,* which was dismissed for lack of subject matter jurisdiction. However, the decision in *Carlingswitch I* was prior to the effective date of 28 U.S.C. § 1581(i) (Supp. V 1981) and the enactment of the Customs Court Act of 1980. Plaintiff moved, in *Carlingswitch II,* alleging jurisdiction under 28 U.S.C. § 1581(i). The court rejected this assertion, citing *Montgomery Ward & Co.* v. *Zenith Radio Corp.,* 69 CCPA 69, 673 F.2d 1254 (1982), noting the legislative history, and concluding that new causes of action cannot be created under 28 U.S.C. § 1581(i). 5 CIT at 72, 560 F. Supp. at 48.

[9] 28 U.S.C. § 1581(i) provides:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> (1) revenue from imports or tonnage;
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
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> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than protection of the public health or safety; or
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> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

CONCLUSION

Given this court's determination that it is without subject matter jurisdiction in this matter, defendant's motion to dismiss must be, and hereby is, GRANTED.

It is so ordered.

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578 F. Supp. 415

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS, AND HIGHVELD LIMITED, COMPANHIA SIDERURGICA PAULISTA (COSIPA), AND USINAS SIDERURGICAS DE MINAS GERAIS (USIMINAS), DEFENDANTS-INTERVENORS

Consolidated Court No. 82-10-01361

Before WATSON, *Judge.*

Memorandum Opinion and Order on Motions for Certification of Appeal, Stay and Severance

[Motion for certification granted; motion for severance granted; motion for stay granted as to severed action.]

(Decided November 9, 1983)

Law Department of United States Steel Corporation (D. B. King, J. J. Mangan, C. D. Mallick, L. Ranney and *P. J. Koenig* of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (Joseph R. Sahid of counsel) for plaintiffs, Republic Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Francis J. Sailer,* attorney, Commercial Litigation Branch) for the federal defendants.

Wald, Harkrader & Ross (Christopher A. Dunn of counsel) for defendants-intervenors COSIPA and USIMINAS.

WATSON, *Judge:* The Court has been presented with a series of related motions centered on the desire of plaintiff United States Steel Corporation (U.S. Steel) to appeal the decision of this Court that its corporate counsel should not have access to confidential business information in the administrative record of this judicial review. *United States Steel Corporation, Republic Steel Corporation, et al.* v. *United States, et al.,* 6 CIT 55 (1983) *rehearing denied,* Slip Opinion 83-99 (October 8, 1983). U.S. Steel has also moved to stay this action pending appeal. In a related motion (made prior to denial of the rehearing), plaintiffs Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation (the Five) moved to sever their action from that of U.S. Steel. They renewed the motion following the denial of rehearing. All the filings made in connection with the motions for certification, stay, and severance have been considered by the Court.

The federal defendants are neutral on the question of certification for appeal, favor the stay of the action if an appeal is certified, and oppose the severance motions made by the Five.

The Five do not oppose certification but oppose U.S. Steel's motion to the extent that it would stay the action being prosecuted by the Five.

U.S. Steel opposes the severance motions of the Five.

The Brazilian intervenors express no opinion on the issue of certification but support a stay in the event an appeal is certified and oppose the severance motions of the Five.

In this opinion, the Court decides in favor of plaintiff United States Steel Corporation's motion for certification of the question of access by corporate counsel to confidential business information in the administrative record. At the same time, it severs from Court No. 82-10-01361 those claims being made by U.S. Steel in which lack of access is an impediment to their conduct of litigation, namely the issues or "creditworthiness," "equity infusions" and "preferential loans." It also stays the severed action.

U.S. Steel remains a party plaintiff in the original Court No. 82-10-01361 with respect to the issues of "time periods" and "methodology," on which the access issue has no bearing. That action is not stayed.

On the question of the presence of those factors which may serve as grounds for appeal, the Court finds them to be present. The issue of whether corporate counsel for U.S. Steel should have access to business confidential information of competitors of U.S. Steel is a controlling question of law in the sense that it markedly restricts the manner in which U.S. Steel may conduct the litigation if it does not retain outside counsel. Although the Court found its own reasoning compelling, it can recognize that there is a substantial ground for difference of opinion on this issue. An immediate appeal from that decision may materially advance the ultimate termination of the litigation being conducted by U.S. Steel.

On the question of what should be done with respect to the action insofar as it is also being prosecuted independently by five other plaintiffs, the Court has not been persuaded by U.S. Steel that the proper step is to hold the entire action in abeyance. What U.S. Steel may lose by seeking appeal is the opportunity to participate as a party in the first wave of judicial review with respect to three issues of importance, but this is not a controlling consideration.

Their challenge on those issues however remains alive in the severed action, so it is not possible to say that they are suffering irreparable injury. The failure to achieve the most desirable order of presentation of issues from the standpoint of litigation strategy is not an irreparable injury to a party. This could easily happen in separate actions involving the same administrative determination if the actions moved at different paces under different judges or even under the same judge. Here, possibly because the parties and the Court have been bending every effort to achieve a unified, efficient, and speedy resolution of the action, this parting of the ways is more jarring than it would ordinarily be. In any event, the reasons for continuing the action as completely as possible are persuasive, notwithstanding the slight complication it involves.

The action has been given a statutory priority in 28 U.S.C. § 2647(4) and must be expedited in every way. Five plaintiffs wish to pursue their action and have already filed briefs on the pending issues. If a balance must be struck, the Court considers the overall completion of the judicial review to be more important as a matter of policy than the interest of a given party in pursuing a matter of particular concern to it. Given the conflicting desires of the parties, the Court believes that it has resolved them as fairly as possible.

Accordingly, it is hereby

ORDERED that Slip Opinion 83-76 be amended to include the paragraph of this opinion which begins "on the question of the presence of those factors which may serve as grounds for appeal," and it is further

ORDERED that the claims by U.S. Steel regarding the issues of "creditworthiness," "equity infusions," and "preferential loans" are severed and given the designation of Court No. 82-10-01361S, and it is further

ORDERED that Court No. 82-10-01361S be stayed pending application for appeal and if appeal is granted, pending appeal.

REPUBLIC STEEL CORPORATION, UNITED STATES STEEL CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA AND UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANTS AND COMPANHIA SIDERURGICA PAULISTA (COSIPA), ET AL., INTERVENORS

Consolidated Court No. 82-03-00372

Before WATSON, *Judge.*

Memorandum Opinion and Order On Motion for Severance

[Motion granted.]

(Decided November 10, 1983)

Cravath, Swaine & Moore (*Alan J. Hruska* of counsel) for plaintiffs Republic Steel Corp., Inland Steel Company, Jones & Laughlin Steel Inc., National Steel Corp., and Cyclops Corporation.

Law Department of United States Steel Corporation (D.B. King, J.J. Mangan, C.D. Mallick, L. Ranney and P.J. Koenig of counsel) for plaintiff United States Steel Corporation.

Office of the General Counsel, International Trade Commission (*Michael H. Stein,* General Counsel; *Michael P. Mabile,* Assistant General Counsel; *Catherine R. Field,* Attorney) for the federal defendants.

Wald, Harkrader & Ross (Christopher Dunn and Vaughan Finn of counsel) for defendant-intervenors COSIPA and USIMINAS.

WATSON, *Judge:* Consolidation, which once held promise for the efficient and speedy resolution of this action, now presents a problem. U.S. Steel has taken an interlocutory appeal of this Court's decision denying its corporate counsel access to business confidential information in the administrative record here under judicial review. The remaining five plaintiffs had moved to sever their actions at a time when the taking of an appeal was uncertain and the Court left the motion pending to await future events. Since the appeal is now a reality, the Court considers it necessary, for the reasons set out more fully in *United States Steel Corporation, Republic Steel Corporation, et al.* v. *United States, et al.* (Slip Opinion 83-115, November 9, 1983) to sever U.S. Steel's action from the others so that the other plaintiffs may proceed in accordance with the statutory priority and expedited treatment required for their action. It would be unfair for them to have to await the outcome of an issue which is of importance only to plaintiff U.S. Steel.

The Court has reviewed the filings of the parties on the question of severance and found no good reason to maintain this action in its consolidated form.

Accordingly, it is

ORDERED that the claims of U.S. Steel are severed from this action and restored to their original form as Court No. 82-07-01053.

MONSANTO INDUSTRIAL CHEMICALS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-10-01470

Memorandum Opinion and Judgment

[Plaintiff motion for Summary Judgment denied; Defendant and Defendant-Intervenor motion for Summary Judgment granted.]

(Decided November 10, 1983)

Stewart & Stewart (Eugene L. Stewart, Terence P. Stewart and Kathleen T. Weaver on the motion) for plaintiff.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Department of Justice, Commercial Litigation Branch, Civil Division (*J. Kevin Horgan* on the motion) for the defendant.

Barnes, Richardson & Colburn (*E. Thomas Honey* and *Richard Haroian* on the motion) for defendant-intervenor Shikoku Chemicals Corporation.

Graham & James (*Stuart E. Benson* and *Gary W. Christian* on the motion) for defendant-intervenor Nissan Chemical Industries.

LANDIS, *Judge:* Plaintiff, a domestic producer of cyanuric acid and its chlorinated derivatives, moves for summary judgment pursuant to Rules 56(a) and 7(f) of this Court. Standing is premised upon Section 777(c)(2) of the Tariff Act of 1930, as amended (19 USC § 1677f(c)(2) (Supp. IV 1980)), and jurisdiction upon 28 USC § 1581(f). The Department of Commerce (ITA division) investigation was published in 48 Fed. Reg. 29037, Cyanuric Acid and Its Chlorinated Derivatives from Japan.

This Court granted an order, brought by plaintiff pursuant to an order to show cause, for an abbreviated time schedule enabling plaintiff to file, and defendant to answer, a summary judgment motion pursuant to the aforementioned statutes. Additionally, the court ordered that two (2) parties (Nissan Chemical Industries and Shikoku) be permitted to intervene. The court held a hearing on the issue in question on November 1, 1983, hearing the parties and intervenors on oral argument.

The singular issue presented is plaintiffs entitlement to the customers' name lists submitted by the intervenors. Plaintiff maintains it requires access to the confidential customers' name lists in order to investigate differential price scales in the foreign home market industry (Japan). Defendant and defendant-intervenors argue that divulgence of these lists is improper on several grounds. Initially, defendant maintains that future antidumping and countervailing duties investigations may be impeded because foreign producers will be reluctant to disclose information under the cloak of confidential treatment where the confidentiality promise is readily sidestepped. Defendant and defendant-intervenors further maintain that plaintiff has failed to sustain its burden under the balance test under Section 777(c)(2) (19 USC § 1677f(c)(2) (Supp. IV 1980)), as enunciated in S. Rep. No. 249, 96th Cong., 1st Sess. 99-100 (1979). Finally, defendant and defendant-intervenors argue that the customer's name list is not relevant and is unnecessary for plaintiff to conduct its proceeding as all other relevant confidential information has been disclosed previously.

In examining all documents of record and upon hearing of oral arguments by all parties and intervenors of record, this Court finds that defendant and defendant-intervenors motion for summary judgment should be granted, and that plaintiff's motion for summary judgment should, in all respects, be denied.

The court appreciates plaintiff's diligence in seeking the confidential information in question. However, disclosure of customer name lists, despite the protection of court order to limited access, has been historically quite limited. *Republic Steel* v. *United States*, 6 CIT 37 (1983), mod., Ct. order (August 29, 1983); *Shawmut, Inc.* v. *American Viscose Corp.*, 11 F.R.D. 562 (S.D.N.Y. 1951); 4 Moore, *Moore's Federal Practice* § 46.60[4]26-242 to 26-245 (2d ed. 1983).

The balancing test, i.e., the respective needs of the foreign producers to protect disclosure of information submitted in confidence as opposed to the harm disclosure may cause if the information disclosed and inadvertently disseminated by the obtaining party must be carefully viewed. Indeed, in the recent case of *Roquette Freres* v. *United States,* 4 CIT 239, 554 F. Supp. 1246, the court developed this balancing test in a *judicial review* pursuant to an adjacent statute proceeding under section 516A(b)(2)(B) of the Tariff Act of 1930. The court set forth this cautious and definitive approach for a judicial proceeding which inevitably determines the *final* outcome of the particular trade action.

The instant action concerns only the investigative stage of the proceedings conducted by the ITA. Release of such requested sensitive confidential documents at the primary stage of an investigation leading to judicial review without compelling reasons surely dampens the propensity of foreign producers to divulge confidential information in future trade cases. The overall domestic public interest is thereby placed at a distinct disadvantage in rectifying future wrongs caused by foreign trade predators.

Here, plaintiff has not demonstrated his need as compared with that of the public interest in obtaining these documents at the investigative stage. Plaintiff is not empowered to act as an independent investigator to the proceeding.

Plaintiff has received all the confidential documents submitted to the ITA during this investigatory period except for the actual customer names. Plaintiff has not demonstrated that the availability of the customer names outweighs the confidential protection afforded by the ITA in the good of the public interest nor, that the relevancy outweighs said public interest.

Therefore, defendant and defendant-intervenors' cross-motion for summary judgment is granted;

Plaintiff's motion for summary judgment is denied.

UNITED STATES, PLAINTIFF *v.* FEDERAL INSURANCE COMPANY AND COMETALS, INC., DEFENDANTS

Court No. 82-05-00594

Before WATSON, *Judge.*

Memorandum Opinion and Order on Motion to Dismiss

[Motion granted in part.]

(Decided November 15, 1983)

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Barbara M. Epstein,* attorney) for plaintiff.

Serko & Simon (David Serko, Margaret H. Sachter, George S. Locker, of counsel) for defendants.

WATSON, *Judge:* This opinion is limited to deciding the plaintiff's motion to dismiss defendants' counterclaims. The action itself was brought by the United States under 28 U.S.C. § 1582 (2) and (3) for payment of duties and to recover on a bond posted to insure the payment of duties. The action was brought against Cometals, Inc., the importer of the merchandise and Federal Insurance Company, the surety under a general term bond posted by the importer. The action was brought after the importer's customshouse broker, James Loudon & Co. Inc., failed to pay the duties and declared bankruptcy.

The defenses and counterclaims are generally based on claims that the government failed to adequately supervise the broker and failed to notify defendants of the broker's precarious financial condition. This assertedly amounted to tortious negligence or breach of an implied contract on the part of the government which caused financial loss to the importer and increased the risk to the surety. The counterclaims are said to arise under the Federal Tort Claims Act (28 U.S.C. §§ 2671 *et seq.*) the Tucker Act (28 U.S.C. § 1491), the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq.*), and the theory of equitable recoupment.

Plaintiff has moved to dismiss the counterclaims for failure to state a claim. In this opinion, the Court dismisses all but one, as being outside the counterclaim jurisdiction of the Court. The counterclaim for equitable recoupment appears to function much as a set-off, and to that extent its disposition is reserved for the decision on plaintiff's main claim.

The Administrative Procedure Act does not create an action for damages so it has no place as a counterclaim in this action. This Court has no jurisdiction over claims arising under the Federal Tort Claims Act (28 U.S.C. § 1346(b)). *Bar Bea Truck Leasing Co.* v. *United States,* 4 CIT 70, 546 F. Supp. 558 (1982) *rev'd on other grounds,* 713 F.2d 1563 (C.A.F.C. 1983). Consequently, a counterclaim under that Act is *a fortiori* outside the jurisdiction of the Court.

The remaining counterclaim is brought under the Tucker Act (28 U.S.C. § 1491). To dispose of that claim, grounded in breach of an express or implied contract, it is sufficient to note that it cannot come within the counterclaim jurisdiction of the Court because it does not meet the statutory requirements.

The terms of 28 U.S.C. § 1583[1] (and Rule 13 of the Court Rules, which reflect the statute) limit counterclaims to claims which involve the imported merchandise or to claims to recover upon a bond or customs duties. It is clear that the "Tucker Act" claim does not belong to the latter. It is further clear that it does not involve the imported merchandise within the meaning of the statute. This reasoning is unavoidable because if "involvement" with the imported merchandise is not sufficient to support a counterclaim by the government to collect customs duties (thus requiring a special mention to permit those counterclaims) the somewhat more remote dispute about the government's obligations to supervise brokers and inform importers and sureties certainly does not "involve the imported merchandise" within the meaning of the counterclaim provision.

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[1] Sec. 1583. *Counterclaims, cross-claims, and third-party actions:* In any civil action in the Court of International Trade, the Court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

For the reasons expressed above, the defendant's counterclaims, with the exception of the claim for equitable recoupment, are hereby DISMISSED.

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575 F. Supp. 1277

AL TECH SPECIALTY STEEL CORPORATION; ARMCO, INC.; CARPENTER TECHNOLOGY CORPORATION; AND CRICIBLE STAINLESS STEEL DIVISION OF COLT INDUSTRIES, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND UGINE ACIERS AND INTSEL CORPORATION, INTERVENORS

Court No. 83-1-00118

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated November 21, 1983)

Collier, Shannon, Rill & Scott (*David A. Hartquist, Paul C. Rosenthal* and *David L. Dick* on the briefs) for plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs) for defendant.

Covington & Burling (*Harvey M. Applebaum* on the briefs) for intervenors.

MALETZ, *Senior Judge:* In this action plaintiffs, American producers of specialty steel, challenge the final results of an administrative review conducted by the Department of Commerce, International Trade Administration (ITA), pursuant to section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (Supp. IV 1980). *See* 48 Fed. Reg. 2,808 (1983). That review focused on a 1973 dumping finding involving stainless steel wire rods imported from France and produced by intervenors. The ITA determined that a *de minimis* dumping margin of 0.3% existed for the review period.

Plaintiffs have moved for review of the ITA's determination pursuant to rule 56.1 of the rules of this court. In their motion they take issue with two procedural aspects of the ITA's section 751 review. The first is the decision by the ITA not to conduct a cost-of-production investigation under section 773(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1677b(b) (Supp. IV 1980).[1] The other is the ITA's refusal to verify information submitted by intervenors Ugine Aciers and Intsel Corporation (Ugine Aciers) in the course of the ITA's review.[2] The government has defended its actions through a cross-motion for judgment upon review of the administrative determination.

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[1] That section provides in part:

For the reasons that follow, the court is of the view that the showing by plaintiffs of home market sales below cost of production was insufficient to warrant a cost-of-production investigation by the ITA. However, the court agrees with plaintiffs' contention that the ITA should have verified the information submitted by Ugine Aciers in the course of the ITA's section 751 review. Accordingly, plaintiffs' rule 56.1 motion is granted in part and denied in part; the government's cross-motion is granted in part and denied in part; and the case is remanded to the ITA with instructions to verify the information supplied by Ugine Aciers during the instant section 751 review.

The court first considers plaintiffs' claim that there was reasonable grounds to believe or suspect that Ugine Aciers' home market sales were below its cost of production.

I

Section 773(b) of the Trade Agreements Act of 1979 provides that the ITA shall investigate a foreign manufacturer's cost of production "whenever [it] has reasonable grounds to believe or suspect that sales in the home market * * * have been made at prices which represent less than the cost of producing the merchandise in question * * *." 19 U.S.C. § 1677b(b). The phrase "reasonable grounds to believe or suspect" is not, of course, self-defining. In an effort to give content and meaning to those words, this court in *Connors Steel Co.* v. *United States,* 2 CIT 242, 527 F. Supp. 350 (1981), announced a general evidentiary threshold amounting to less than the probable cause needed to secure a search warrant. *Id.* at 248, 527 F. Supp. at 357. When that threshold is met, the ITA must conduct a cost-of-production inquiry. *Id.* at 249, 527 F. Supp. at 357–58.

While helpful here in some measure, this general evidentiary standard falls somewhat short of providing clear guidance dispositive of the myriad factual situations that will undoubtedly arise. There is, however, an instructive body of law stemming from the

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[2] Section 776(a) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1677e(a) (Supp. IV 1980), provides in part:

> (b) *Sales at less than cost of production*
>
> Whenever the administering authority [the ITA] has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales [were] made at less than cost of production—
>
> * * * * * * *
>
> such sales shall be disregarded in the determination of foreign market value.
>
> [The ITA] shall verify all information relied upon in making a final determination in an investigation. In publishing such a determination, the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its determination, which may include the information submitted in support of the petition.

Supreme Court's decision in *Terry* v. *Ohio,* 392 U.S. 1 (1968), wherein courts have grappled with the slippery concept of "reasonable suspicion." The upshot has been the formulation of detailed guidelines for determining whether *vel non* such suspicion exists in a given case.[3] The teaching of *Terry* and its progeny is that in order for reasonable suspicion to exist there must be "a particularized and objective basis for suspecting" the existence of certain proscribed behavior, taking into account the totality of the circumstances—the whole picture. *United States* v. *Cortez,* 449 U.S. 411, 417 (1981); *United States* v. *Merritt,* 695 F.2d 1263, 1268 (10th Cir. 1982), *cert. denied,* 103 S. Ct. 1898 (1983). Elaborating on these criteria the Supreme Court explained in *Cortez:*

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present * * *. First, the assessment must be based upon all of the circumstances. * * *
>
> The process does not deal with hard certainties, but with probabilities. * * * Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field * * *.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual * * * is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry* v. *Ohio, supra,* said that "[t]his demand for specificity in the information upon which * * * action is predicated is [this Court's] *central teaching* * * *."

Id. at 418 (emphasis in original). *See also Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 320-21 (1978) (probable cause in the administrative law context is established by *specific* evidence).

In the present case, plaintiffs drew several items to the ITA's attention which taken together, they contend, should have given rise to a "reasonable suspicion" on the ITA's part that Ugine Aciers was selling stainless steel wire rods in France below its cost of producing such merchandise. The government and Ugine Aciers counter that not only was this information presented in an untimely fashion by plaintiffs, it was also insufficient to create such a suspicion.

Assuming for the present the timeliness of plaintiffs' submission, the court believes that the information presented by them was much too general in nature to arouse a reasonable suspicion of below-cost-of-production sales by Ugine Aciers in its home market.[4] The first two items plaintiffs referred to were a foreign steel industry press release entitled "Eurofer," and a European Commission paper. Those sources indicated that European steel producers had incurred significant increases in raw material and energy costs, but that prices had failed to keep pace. However, the Eurofer press release was a very general reference to costs for all European Community steel producers, lumping together both carbon and stainless steel manufacturers throughout the entire European Economic Community. *Cf. Donovan* v. *Federal Clearing Die Casting Co.*, 655 F.2d 793, 797 & n.9 (7th Cir. 1981) ("We need not belabor the point that all newspaper reports are not of sufficient reliability to form the basis of [a] probable cause determination" in the context of an OSHA search warrant application.). The European Commission paper, when it did refer to the special steel industry, referred to an average of all European special steel prices and costs—not French stainless steel, and not Ugine Aciers' stainless steel wire rod.

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[3] It is true that the requirements of reasonable grounds in the administrative law context are not as exacting as in the criminal law sense. *See, e.g., Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 320 (1978); *Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373, 377 (7th Cir. 1979); *Chicago Zoological Society* v. *Donovan,* 558 F. Supp. 1147, 1151 (N.D. Ill. 1983). Nevertheless, a crucial common thread runs through each area which provides a useful tool for demarcating the metes and bounds of section 773(b)'s "reasonable grounds to believe or suspect" standard: In both the administrative and criminal law contexts specific, particularized evidence is the touchstone. *See Marshall* v. *Barlow's, Inc.,* 436 U.S. at 320. *See generally* Rothstein, *OSHA Inspections After Marshall* v. *Barlow's, Inc.,* 1979 Duke L.J. 63.

Plaintiffs next maintain that a series of antidumping and countervailing duty petitions filed in early 1982 against nine European and non-European producers of carbon steel should have alerted the ITA to below cost-of-production sales in France by Ugine Aciers. But allegations of sales below cost of production with respect to diverse producers of *carbon* steel have little if any relevance to an administrative review of sales by a French producer of *stainless* steel wire rod. In this same connection, plaintiffs assert that an antidumping petition containing below-cost-of-production-sales allegations filed against French producers of stainless steel sheet and strip should have caused the ITA to believe or suspect similar such sales by Ugine Aciers. Given that Ugine Aciers does not manufacture or sell stainless steel sheet or strip, the chain of inferences required to reach the conclusion suggested by plaintiffs is far too tenuous.

Quoting from two American trade papers, plaintiffs further claim that a characterization of Ugine Aciers in one of those papers as a "loss-making" operation, and a statement in the other that Ugine Aciers had suffered a $105 million loss, should have provided the ITA with reasonable grounds to believe or suspect less-than-cost-of-production sales of stainless steel wire rod. Be that as it may, the mere use of the adjective "loss-making" fails to show less-than-cost-of-production sales of a single product sold in a discrete market where the company to which the adjective was applied sold a vast range of products in markets around the world. *Cf. Federal Clearing Die Casting Co.,* 655 F.2d at 797 ("Mere journalistic prose is not the kind of underlying factual data upon which a magistrate can exercise [independent] judgment" in an OSHA administrative law context.). And as for the press statement regarding the $105 million loss, considering that Ugine Aciers is a highly diversified, world-wide exporter, evidence of a company-wide loss fails to adequately pinpoint below-cost-of-production sales of an individual product in one of the company's many markets.

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[4] In this connection the court notes with concern the following sweeping statement by the government:

> That decision [not to conduct a cost-of-production investigation] should be deferred to by this Court because it is supported by substantial evidence in the administrative record. It is not for this Court to weigh the evidence and substitute its judgment for that of the Commerce Department in order to arrive at the result desired by plaintiffs.

A reviewing court will, of course, pay substantial deference to a magistrate's "reasonable grounds" determination, *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), but this is so because of a magistrate's status as a neutral and detached judicial officer, not as a perhaps overzealous law enforcement agency. *Id.; Donovan* v. *Federal Clearing Die Casting Co.*, 655 F.2d 793, 798 (7th Cir. 1981). Whether the evidence presented to the ITA is sufficient to provide reasonable grounds to believe or suspect *is a question of law which this court must ultimately resolve. See United States* v. *Rubio*, 703 F.2d 1124, 1129 (9th Cir. 1983) (published in advance sheets, but withdrawn from bound volume pending rehearing); *United States* v. *Glen-Archila*, 677 F.2d 809, 813–14 n.7 (11th Cir.) ("it is for the court * * * ultimately to resolve whether * * * the legal standard for reasonable suspicion was met"), *cert. denied*, 103 S. Ct. 165 (1982); 19 U.S.C. § 1516a(b)(1)(A) ("The court shall hold unlawful any determination, finding, or conclusion found—* * * to be unsupported by substantial evidence, *or otherwise not in accordance with law.*" [Emphasis added]).

The final factor on which plaintiffs rely—and the only evidence which is objective, specific and particularized—is based on the non-confidential summary of Ugine Aciers' response to the ITA's review questionnaire. On the basis of those figures, plaintiffs speculate that there must have been below-cost sales in the French market during the review period because wire rod prices appeared to them to have remained stable when compared with prices from the summary in the prior review period. While specific and particularized, this is no evidence of sales below Ugine Aciers' cost of production. First of all, the summary did not represent actual prices. Rather, consonant with Commerce Department regulations, *see* 19 C.F.R. § 353.28(a)(1), that summary reflected prices in ranges with a plus-or-minus accuracy of ten percent. Second, in making their argument plaintiffs do not refer to the confidential submission of home market price information which was made available to them. That information indicates that at most Ugine Aciers' prices for most types of stainless steel wire rod sold in France remained stable between review periods, but that for several other types prices increased. Thus, even if specific and particularized, this evidence is much too thin to give rise to any reasonable suspicion of home market sales below cost of production.

The situation presented here is completely dissimilar from that in *Connors.* There, Connors constructed a steel trigger price which showed sales by the foreign manufacturer below that figure. It presented proof of its own costs of production to show, in conjunction with its claim of approximately the same efficiency of production, that the foreign manufacturer's sale price was below cost of production. Finally, it pointed to a statement appearing in the foreign manufacturer's own annual report that on various occasions the latter had accepted orders whose price did not cover fixed production costs. In *Connors,* then, the evidence was specific and particularized. Here, by sharp contrast, the evidence in the main is not. Based on the showing made by plaintiffs, the ITA could have had a belief or suspicion that was nothing more than an "inchoate and unparticularized suspicion or 'hunch,'" *Terry,* 392 U.S. at 27, a belief or suspicion which never could have ripened into one that was "reasonable." Plaintiffs' submission, considered as a whole, including the comparison chart of Ugine Aciers' prices from one review period to the next, is "simply too slender a reed to support" the conclusion that there was reasonable grounds to suspect home market sales by Ugine Aciers below its cost of production. *See Reid* v. *Georgia*, 448 U.S. 438, 441 (1980).

Withal, the court is not insensitive to the burden on American manufacturers of demonstrating reasonable grounds to believe or suspect home market sales below cost of production. It should be clear that an American manufacturer cannot be required to make a showing based on confidential cost information within the exclusive control of its foreign competitor. Indeed, "it is unreasonable to expect a party to produce data directly from the costs of production of a competitor." *Connors*, 2 CIT at 247, 527 F. Supp. at 356. But, all in all, the evidence presented by plaintiffs is entirely too remote and generalized to give rise to a reasonable suspicion of below-cost-of-production sales by their French competitor. Accepting plaintiffs' contention would require straying into the realm of surmise.

In sum, absent a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production, section 773(b)'s threshold requirement of "reasonable grounds to believe or suspect" has not been satisfied. *See Federal Clearing Die Casting Co.*, 655 F.2d at 797–98; *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373, 377 (7th Cir. 1979).

The court turns next to plaintiffs' claim that the ITA was obligated to verify the information submitted to it by Ugine Aciers in the course of its section 751 review.

II

Pointing to section 776(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 1677e(a), plaintiffs argue that the ITA was required to verify the information submitted by Ugine Aciers. The government seizes upon the language in section 776(a)—"verify all information relied upon in making *a final determination in an investigation*"—in support of its position that a section 751 review is a "proceeding," not an "investigation," and that the ITA is, therefore, not required to verify information submitted in such a "proceeding." Ugine Aciers, agreeing with the government, has nonetheless expressed its continued willingness to submit to verification.

The government argues that nowhere in section 751 did Congress refer to a section 751 review as an "investigation", nor did Congress provide for a "final determination" in the case of periodic reviews under that section.[6] By contrast, the government points out, in two sections of the Trade Agreements Act of 1979 Congress specifically provided for "final determinations" by the ITA during the phase between the commencement of an "investigation" and the publication of an antidumping duty order. *See* 19 U.S.C. §§ 1671d and 1673d (Supp. IV 1980). Accordingly, the government contends, a section 751 review "proceeding" does not literally fall within the verification obligation of section 776(a). In further support of its position that a section 751 review is a "proceeding," the government cites certain regulations in which the Commerce Department distinguishes between an "investigation" and a "proceeding,"[7] the former describing a more narrow phase of the administrative process, the latter being all-encompassing.

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[6] Section 751, 19 U.S.C. § 1675 (Supp. IV 1980), provides in part:

However Commerce may have devised its "proceeding/investigation" distinction, it is nevertheless evident both from the statute and the legislative history of section 751 that a section 751 review results in "a final determination in an investigation," albeit periodic in nature.

First, the Senate Report on the Trade Agreements Act of 1979 explained:

> Subsection (a)(2) of section 516A would render *certain final determinations* subject to judicial review in the Customs Court at the instance of any "interested party" as defined in subsection (f)(3). These *final determinations* would be confined in subsection (a)(2)(A) to: (1) final determinations regarding the imposition of a countervailing or antidumping duty; (2) *periodic determinations of the amount of countervailing or antidumping duties to be imposed;* (3) determinations to suspend antidumping or countervailing duty investigations as the result of an agreement eliminating the injurious effects caused by the subsidies or sales at less than fair value; (4) determinations by the International Trade Commission resulting from the review of an agreement to eliminate the injurious effect of subsidized imports or sales at less than fair value.

S. Rep. No. 249, 96th Cong., 1st Sess. 247 (1979) (emphasis added), *reprinted in* 1979 U.S. Code Cong. & Ad. News 633. In addition, that same Senate Report, as well as the House Report, makes clear that a section 751 review represents the duty assessment phase of an antidumping duty investigation:

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[7] 19 C.F.R. § 353.11(b) (1982) provides:

(a) *Periodic review of amount of duty*

(1) *In general*

At least once during each 12-month period beginning on the anniversary of the date of publication of a * * * finding under the Antidumping Act, 1921, * * * the administering authority, after publication of notice of such review in the Federal Register, shall—

* * * * * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, * * *.

* * * * * * *

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

An "investigation" refers to that time between the publication of a notice of initiation and the publication of the earliest of (1) a notice of termination, (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) an Order.

19 C.F.R. § 353.11(a) (1982) provides:

A "proceeding" refers to that time from the filing of a petition (or publication of a notice of self-initiation under section 732(a) of the Act) until the publication of the earliest of: (1) A notice of termination, (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) a notice of revocation of an Order.

> This provision [section 751] expedites the administration of the assessment phase of antidumping and countervailing duty investigations.

S. Rep. No. 249, 96th Cong., 1st Sess. 80–81 (1979), *reprinted in* 1979 U.S. Code & Cong. Ad. News 466–67. *Accord* H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). Thus, Congress viewed a section 751(a) review as one of several kinds of final determinations which may be made in the course of an antidumping duty investigation.[8]

Moreover, the statutory responsibilities of the ITA in a section 751 antidumping duty review are truly investigatory in nature. Section 751(a)(2), 19 U.S.C. § 1675(a)(2), requires the ITA to determine:

> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

This determination is more than a mere mathematical exercise. The data necessary for these computations must be obtained from the foreign manufacturer or importer. Section 751(a)(2) in fact contemplates just such data gathering as evidenced by its admonition to the ITA not to reveal "confidential information" when publishing the final results of its section 751 review in the Federal Register. *See* 19 U.S.C. § 1675(a)(2). This subsection, in substance, describes an agency investigation in the course of which a final determination will be made, the ITA's regulations to the contrary notwithstanding. *See Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) ("Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'").

Besides relying on its own regulations, the government also contends that since plaintiffs have not attributed any error in the final results to lack of verification, nor have they suggested that the information submitted by Ugine Aciers was inaccurate, unreliable or untrustworthy, they cannot complain about non-verification. This argument is not only disingenuous, it completely misses the mark. For without verification *neither* the government nor plaintiffs—nor the court for that matter—is in a position to evaluate the accuracy or reliability of Ugine Aciers' submission and, ultimately, *that of the ITA's final results. This* is the point. It is not incumbent upon plaintiffs to either show or allege supple prevarication by Ugine Aciers in order to challenge the ITA's failure to verify. The government's reliance on the harmless error rule is, therefore, misplaced. *Compare Timken Co.* v. *Regan*, 4 CIT 174, 552

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[8] Indeed, section 776(a) refers to "a final determination," not "*the* final determination."

F. Supp. 47, 52 (1982) ("It is basic that procedural irregularities by an administrative agency are not per se prejudicial.").

In the last analysis, to allow information submitted by a foreign manufacturer in the course of a section 751 review to escape verification would make a mockery of the Trade Agreements Act of 1979. One of the primary criticisms voiced by Congress when drafting that Act was the lax enforcement of the antidumping duty law by the Treasury Department, particularly when it came to assessment of duties:

> The Committee is very dissatisfied with the past record of the Secretary of the Treasury in assessing duties on entries subject to a dumping finding.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69. It was this dissatisfaction which provided the impetus for transferring responsibility for administering the countervailing and antidumping duty laws from Treasury to Commerce. To now permit the ITA to conduct a section 751 review—the all important duty assessment phase of an antidumping duty investigation—without at the same time requiring it to verify information submitted to it in the course of such a review would be in effect to allow that agency to repeat the shortfalls of its predecessor. Not only was such a result not contemplated by Congress, it would be inimical to Congress' unequivocal direction that the ITA vigorously enforce the antidumping duty law. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 48 ("The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past * * *. The provisions of this bill are intended to remedy this situation."). In the face of such a compelling congressional expression, pleas of administrative inconvenience based on an alleged "verification" burden ring hollow.

In short, it makes little sense to require detailed verification of all information submitted by foreign manufacturers during the less-than-fair-value investigation stage, but not to likewise require such verification when the agency actually assesses antidumping duties. It would stultify congressional purpose to say that the ITA has no duty to verify information submitted by a foreign manufacturer in the course of a section 751 review. *See Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 548 F. Supp. 1261, 1267 (1982) ("If a reading of a statute leads to a result which is 'contrary to the congressional intent and leads to absurd conclusions,' it is to be rejected."). Accordingly, considerations of sound and prudential administration of the antidumping duty law mandate verification of information by the ITA at this most critical phase.

III

For all the foregoing reasons, plaintiffs' motion for review of the administrative determination is granted in part and denied in part;

the government's cross-motion for judgment upon review of the administrative determination is granted in part and denied in part; and the case is remanded to the ITA with directions to verify the information submitted by intervenors in the course of the agency's latest section 751 review.

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575 F. Supp. 1285

AL TECH SPECIALTY STEEL CORPORATION; ARMCO, INC.; CARPENTER TECHNOLOGY CORPORATION; and CRUCIBLE STAINLESS STEEL DIVISION OF COLT INDUSTRIES, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT and UGINE ACIERS AND INTSEL CORPORATION, INTERVENORS

Court No. 83-1-00118

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated November 21, 1983)

Collier, Shannon, Rill & Scott (*David A. Hartquist, Paul C. Rosenthal* and *David L. Dick* on the briefs) for plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs) for defendant.

Covington & Burling (*Harvey M. Applebaum* on the briefs) for intervenors.

MALETZ, *Senior Judge:* Plaintiffs have moved for a preliminary injunction pursuant to rule 65 of the rules of this court to enjoin *pendente lite* the liquidation of entries of stainless steel wire rods entered by intervenors Ugine Aciers and Intsel Corporation (Ugine Aciers). That merchandise is the subject of an outstanding dumping finding issued in 1973, *see* 38 Fed. Reg. 9,094 (1973), which was administratively reviewed by the Department of Commerce, International Trade Administration (ITA), under section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (Supp. IV 1980). *See* 48 Fed. Reg. 2,808 (1983). Plaintiffs now seek injunctive relief pending resolution of their judicial challenge to that section 751 review.

In order to prevail on a motion for a preliminary injunction, plaintiffs must show (1) that they will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors petitioners. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983). *See also S.J. Stile Assoc., Ltd.* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981); *Timken Co.* v. *United States,* 6 CIT 76, 569 F. Supp. 65, 68 (1983). Considering for the moment the second of these four criteria, in their complaint plaintiffs have taken issue with two alleged procedural irregularities in the ITA's section 751 review. In an opinion promulgated this day the court has addressed each of those challenges, ruling for plaintiffs on an issue involving information verification under section 776(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(a) (Supp. IV 1980). *See Al Tech Specialty Steel Corp.* v. *United States*, 6 CIT 245 (1983).[1]

While in a strictly technical sense plaintiffs have now prevailed on the "merits" of their complaint, they have not done so in the more refined and ultimate sense of that term. For plaintiffs have yet to begin their attack on the substantive aspects of the ITA's section 751 review—in this court's view, the "true" merits. This is quite understandable, naturally, since without verification of the information submitted by Ugine Aciers it is literally impossible for plaintiffs to meaningfully challenge the substance of the ITA's section 751 results. No one can know upon what those results are predicated absent such verification.

The present action is thus merely a prelude. It certainly takes little prescience to predict, of course, that plaintiffs will launch a direct attack on the ITA's final results following the verification process, contingent upon just what that verification reveals. In the meantime, however, the court is faced with the unusual situation of being totally unable to make any prognostication as to the likelihood of plaintiffs' ultimate success. But it is also patently clear that plaintiffs will suffer irreparable harm if liquidation of those entries occurring during the review period is not enjoined. Insofar as irreparable harm is concerned, the Federal Circuit noted in its recent *Zenith* opinion that:

> Without a preliminary injunction, all of the entries occurring during the review period will be liquidated immediately, with dumping duties assessed in accordance with the margin set by the review determination. This result is required, in the absence of a preliminary injunction, by two sections of the Trade Agreements Act of 1979 [19 U.S.C. §§ 1516a(e) and (c)(1) (Supp. IV 1980)].
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> * * * * * * *
>
> The statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on the dumping duties assessed on entries of television receivers during the '79–'80 review period. * * * [Zenith] has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress. Defeat of that strong congressionally rec-

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[1] In that opinion the court upheld the ITA's decision not to undertake a cost-of-production investigation under 19 U.S.C. § 1677b(b) (Supp. IV 1980), but held that the ITA had a duty under 19 U.S.C. § 1677e(a) (Supp. IV 1980) to verify information submitted by intervenors in the course of its section 751 review. The case has been remanded to the ITA for verification of that information.

> ognized competitive interest and the abrogation of effective judicial review are sufficient irreparable injury here.

Id. at 810. In the present case plaintiffs are precisely circumstanced as was Zenith relative to entries occurring during the section 751 review period—absent an injunction, those entries will be liquidated immediately, thereby frustrating plaintiffs' right to judicial review in connection with those entries. Therefore, to that extent unless liquidation is enjoined, plaintiffs will forever lose their statutory right to challenge in this forum any errors in the ITA's final results attributable to the failure of the ITA to verify the information submitted by Ugine Aciers. More importantly, such liquidation will oust this court of jurisdiction vis-a-vis those entries.

Given these circumstances, the court believes that the most appropriate vehicle for preserving its jurisdiction and, concomitantly, plaintiffs' judicial review rights, is an injunction issued pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976).[2] *See Alberta Gas Chemicals, Inc.* v. *United States,* 85 Cust. Ct. 122, 125, C.R.D. 80-13, 496 F. Supp. 1332, 1335 (1980). The court is led to this conclusion by two decisions of the Supreme Court involving the All Writs Act. The first is *FTC* v. *Dean Foods Co.,* 384 U.S. 597 (1966), where the Court noted:

> [D]ecisions of this Court "have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. * * * Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action * * *." *Arrow Transp. Co.* v. *Southern R. Co.,* 372 U.S. 658, 671, n.22 (1963).

Id. at 604. The court finds even more compelling the supreme Court's further observation in the All Writs context that:

> If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.

Scripps-Howard Radio, Inc. v. *FCC,* 316 U.S. 4, 10 (1942). On the strength of these pronouncements, the court is firmly convinced that in the exercise of its sound discretion issuance of an injunction under the All Writs Act is appropriate here.

Accordingly, it is hereby ordered:

1. That defendant be, and it hereby is, restrained and enjoined from liquidating any and all entries of the merchandise covered by

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[2] The All Writs Act provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

the final results of administrative review, a notice of which was published on January 21, 1983, in 48 Fed. Reg. 2808; and

2. That unless sooner modified or vacated for good cause shown this order shall expire *ex proprio vigore* thirty days after publication in the Federal Register of notice of defendant's redetermination.

UNITED STATES, PLAINTIFF v. KEITH W. ATKINSON, AND ST. PAUL FIRE & MARINE INSURANCE COMPANY, DEFENDANTS

Court No. 82-12-01742

Before BOE, *Judge.*

Memorandum Opinion

[Plaintiff's motion for summary judgment, granted; defendant's, St. Paul Fire and Marine Insurance Company motion for judgment on the pleadings, denied; defendant's, St. Paul Fire and Marine Insurance Company, cross claim against the defendant, Keith W. Atkinson, dismissed without prejudice.]

(Decided November 21, 1983)

J. Paul McGrath, Assistant Attorney General; (*Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Michael P. Maxwell* on the briefs), for the plaintiff.

Glad, White & Ferguson (*Robert Glenn White* on the briefs), for the defendants.

BOE, *Judge:* In the above-entitled action, plaintiff has filed a motion for summary judgment to collect $13,700 in liquidated damages, jointly and severally, from named defendants Keith W. Atkinson and St. Paul Fire and Marine Insurance Company (hereinafter "St. Paul"). Defendant St. Paul in response to this motion contends that:

1. There are genuine issues of material fact yet to be tried or otherwise established, and
2. Plaintiff has not complied with applicable and controlling statutes and regulations, and
3. The plaintiff has failed to state a claim upon which relief can be granted in that its claim is barred by the statute of limitations.

Notwithstanding its contention that genuine issues of material fact exist which St. Paul asserts in opposition to plaintiff's motion for summary judgment, St. Paul cross moves for judgment on the pleadings. St. Paul predicates its motion on the grounds that the undisputed facts appearing from the pleadings entitle it to judgment.

St. Paul has further filed a cross claim against Atkinson to compel payment and for indemnity for any monies collected by the plaintiff in this action.

The facts alleged by the plaintiff and admitted by the defendant in its answer are set forth in pertinent part:

Defendant St. Paul, as surety, and Atkinson, as principal, executed, and delivered to plaintiff on or about February 10, 1975 an Immediate Delivery and Consumption Entry Bond covering "an application dated January 29, 1975, for special permit to land and deliver immediately certain articles expected to arrive at the port of Portland, Oregon . . . ." Under the terms of the bond, Atkinson and St. Paul jointly and severally guaranteed to pay liquidated damages to the District Director of Customs if the principal did not timely redeliver the imported merchandise after a proper demand by Customs.

On February 12, 1975, Atkinson entered three automobiles into the United States and made a statement maintaining that they conformed with applicable Federal Motor Vehicle Safety Standards. The Office of Standards Enforcement notified Atkinson on February 28 and June 19, 1975 that the aforementioned statement was not acceptable to the Department of Transportation.

The Customs Service mailed a Notice of Redelivery to Atkinson on December 14, 1976, ordering him to redeliver the automobiles to Customs custody within five days. Atkinson never redelivered the automobiles.

On December 20, 1976, and February 22, March 7 and March 24, 1978, the District Director's office mailed demands for payment of liquidated damages in the amount of $13,700 to Atkinson at his last known address. A Customs Service Agent personally served defendant Atkinson with a copy of the notice on February 27, 1978.

Atkinson filed a petition for relief with the District Director of Customs on April 24, 1978. The District Director agreed to mitigate the full claim to $3,000 provided that amount was paid within thirty days. When neither Atkinson nor St. Paul paid the mitigated amount, Customs sent a formal bill for the full amount of liquidated damages to the principal on November 24, 1978.

By letters of July 18, 1979, and October 20 and December 27, 1981, Customs attempted unsuccessfully to collect the liquidated damages from defendant St. Paul. Plaintiff brought this action to recover liquidated damages on the surety bond on December 17, 1982.

A motion for summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(d) of the Court of International Trade Rules. In its opposition to plaintiff's motion St. Paul contends that genuine issues of material fact exist and proceeds to assert facts raising defenses not previously pleaded in its answer to plaintiff's complaint.

St. Paul claims that the Customs Service "has failed to comply with applicable and controlling statutes and regulations," including:

1. 19 C.F.R. § 113.52.
2. 19 C.F.R. § 141.113(b), (f).
3. 19 C.F.R. §§ 172.1–.2.

The defense of failure to comply with regulations is considered an affirmative defense. *Dorsey and Co.* v. *Banque National de la Republic D'Haiti,* 393 F. Supp. 893, 897–98 & n.6 (S.D.N.Y. 1975). *See St. Paul Fire & Marine Insurance Co.* v. *United States,* 370 F.2d 870 (5th Cir. 1967). If St. Paul desired to assert facts which put plaintiff's failure to follow its own regulations in issue, it should have so pleaded in its answer. "In pleading to a preceding pleading, a party shall set forth affirmatively * * * illegality, laches, * * * statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Rule 8(d) of the Court of International Trade Rules. The failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. 5 C. Wright and A. Miller, *Federal Practice and Procedure,* § 1278 (1969). *See Trio Process Corp.* v. *L. Goldstein's Sons, Inc.,* 461 F.2d 66 (3d Cir. 1972); *RCA* v. *Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970); *Albee Homes, Inc.* v. *Lutman,* 406 F.2d 11 (3d Cir. 1969); *Roe* v. *Sears, Roebuck & Co.,* 132 F.2d 829 (7th Cir. 1943).

Defendant has not sought to institute these affirmative defenses by pursuing the remedy available to it by moving at any time prior to judgment for leave to amend its answer under Rule 15(a) of this court. Counsel for St. Paul in reply to plaintiff's opposition to the motion for judgment on the pleadings insists on the right to initally assert the affirmative defenses in question in its motion for judgment on the pleadings and in its response to plaintiff's motion for summary judgment. It appears that counsel endeavors to satisfy the plaintiff's objections by stating in its reply that "the appropriate pleading should be deemed amended." However, established rules and principles of pleading and practice cannot be the subject of modification or disregard by litigants. A statement that pleadings may be deemed amended is not a substitute in an action of this character for a motion directed to this court for allowance to amend the answer stating the specific manner and form of the intended amendment. Rule 15(a) of the Court of International Trade Rules.[1] Since these defenses accordingly are excluded from this action, the facts relating thereto alleged in defendant's response to plaintiff's motion for summary judgment do not constitute genuine issues to be tried.

Defendant St. Paul has raised two affirmative defenses in its answer:

1. The statute of limitations, and
2. The failure to state a claim upon which relief can be granted.

Both defenses are predicated upon 28 U.S.C. § 2415 which states:

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[1] The right of the plaintiff under the rules of court to respond to a motion for allowance to amend cannot be abrogated by the defendant's assertion in a reply that its prior pleading might be deemed amended.

> [E]very action for money damages brought by the United States on an officer or agency thereof which is founded upon any contract express or implied by law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *

The agreed facts indicate that the defendants executed the Immediate Delivery Consumption Entry Bond on February 10, 1975, took custody of the subject merchandise in the United States on February 12, 1975, and failed to redeliver the merchandise within five days of the mailing of the redelivery order (December 19, 1976). Plaintiff initiated this action by the filing of a summons and complaint on December 17, 1982.

When the defendants signed the bond in question, they entered into a contract with the government to redeliver the subject merchandise upon the request of Customs. Defendants breached the bond agreement when they failed to so redeliver the merchandise to Customs. It is a general rule that "the statute of limitations begins to run on the date that a cause of action for breach accrues, which is ordinarily the time of the breach of the agreement." *Schmidt* v. *McKay,* 555 F.2d 30, 34 (2d Cir. 1977). *See Sven Salem AB* v. *Jacq. Pierot, Jr. & Sons, Inc.,* 559 F. Supp. 503 (S.D.N.Y. 1983); *U.S.* v. *Cardinal,* 452 F. Supp. 542 (D. Vt. 1978).

The cause of action against the defendants in this case accrued on December 19, 1976. The summons and complaint filed on December 17, 1982, accordingly, was within the six year limitation period provided by 28 U.S.C. § 2415.

Customs Regulation 19 C.F.R. § 141.113(g) provides for the assessment of liquidated damages when an importer fails to comply with a demand to redeliver merchandise. Defendant St. Paul has admitted that it bound itself to pay liquidated damages to the District Director of Customs if the merchandise was not timely redelivered to Customs after a proper demand was made to the principal. The facts alleged in plaintiff's complaint and admitted by answer establish the liability of St. Paul for the liquidated damages sought by the plaintiff. *See United States* v. *Dieckerhoff,* 202 U.S. 302 (1906).

Defendant St. Paul couples a "Motion for Judgment on the Pleadings" with its "Statement Of Material Facts Of Which There Are Genuine Issues To Be Tried." Asserting in its cross motion that the undisputed facts appearing from the pleadings entitle it to judgment as a matter of law, St. Paul reiterates the identical affirmative defenses maintained in its response to plaintiff's motion for summary judgment. The reassertion of the affirmative defenses in St. Paul's cross motion, predicated upon the existence of undisputed facts appearing from the pleadings, can receive no more favorable reception by the court than in its previous determination herein with respect to those identical defenses in St. Paul's opposition to plaintiff's motion for summary judgment.

Plaintiff states in its motion for summary judgment that it did not serve process on Atkinson. Consequently, Atkinson has not been made a co-defendant in this action. It follows that the United States may not have summary judgment, jointly and severally, against St. Paul and Atkinson. The judgment sought in this action can only lie against St. Paul.

St. Paul, however, has filed a cross claim against Atkinson to compel payment and for indemnity for any monies collected by the plaintiff. The rules of this court permit cross claims only against co-parties to an action. Rule 13(f) of the Court of International Trade Rules. Since Atkinson is not a party to this action, he is not subject to a cross claim by St. Paul. Nor can Atkinson be deemed to have been joined as a third party defendant.

The rules of this court provide that a defending party, as a third party plaintiff, may "cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Rule 14(a) of the Court of International Trade Rules.

Counsel for St. Paul has attached three certificates of service to its purported cross claim stating that Atkinson had been served *by mail* at three different addresses on January 20, 1983. Rule 4(d)(7) of this court permits service in a manner prescribed by the law of the state in which service is made. The State of California, situs of service, allows service by mail. "A summons may be served by mail as provided in this section." *Cal. Civ. Proc. Code* § 415.30 (West 1973). This statute, however, requires the person served to return an acknowledgment of receipt.[2] "No judgment can be rendered against the defendant on the basis of mere mailing of a summons, for proof of service requires the receipt of the acknowledgment." 21 *Hastings L. J.* 1281, 1288 (1970). *See Cal. Civ. Proc. Code* § 417.10 (West 1973). Defendant St. Paul's proof of service does not include any acknowledgment of a receipt of summons. Accordingly, this court has not acquired jurisdiction over the person of Atkinson, necessary to a consideration of St. Paul's claim in reimbursement against him.

Plaintiff has requested in his motion for summary judgment pre- as well as postjudgment interest in accordance with the rate provided in 28 U.S.C. § 2644. As the government correctly acknowledges, the provisions in 19 U.S.C. § 580 are inapplicable for the reason that this action is to recover liquidated damages, not duties.

28 U.S.C. § 2644 specifically relates to the award of interest upon monetary relief received "in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930." This court is not of the opinion that the provisions of the foregoing stat-

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[2] "Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender." *Id.* § 415.30(c).

"If service is made by mail pursuant to Section 415.30, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court." *Id.* § 417.10(a).

ute are applicable to a monetary judgment received in an action brought under 28 U.S.C. § 1582.[3]

Congress, however, in 28 U.S.C. § 1961 has mandated a general interest provision applicable to all federal district courts. Since no other comparable general interest provision has been specifically enacted for this court, the statutory interest rate provided in 28 U.S.C. § 1961 properly may be utilized in this action upon the award of a monetary judgment. *See United States* v. *Servitex, Inc.*, 3 CIT 67 (1982).

No specific statute provides for the recovery of prejudgment interest in an action of this character. "In the absence of a statutory provision the award of prejudgment interest is in the discretion of the court." *Payne* v. *Panama Canal Co.*, 607 F.2d 155, 166 (5th Cir. 1979). *See United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981). The need to compensate an injured plaintiff is the major factor in determining whether prejudgment interest should be awarded. *Payne*, 607 F.2d at 166. Since any injury to the plaintiff is in good measure related to its own laxness in initiating this action, fairness does not dictate the granting of prejudgment interest to the plaintiff.

By reason of the foregoing the court determines that a judgment should be entered herein providing:

1. That plaintiff's motion for summary judgment against the defendant St. Paul be granted and that the plaintiff, accordingly, be granted judgment against the defendant St. Paul in the sum of $13,700 together with interest thereon from and after the date of entry of this judgment at the rate of interest provided in 28 U.S.C. § 1961.

2. That the motion for judgment on the pleadings of the defendant St. Paul be denied.

3. That the cross claim of the defendant St. Paul against Keith W. Atkinson be dismissed, without prejudice, for lack of jurisdiction over the person Atkinson.

Let judgment be entered accordingly.

BORDER BROKERAGE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-9-02194

Before FORD, *Judge.*

Harvesting Equipment

[Judgment for plaintiff.]

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[3] The court recognizes the decision made in *United States* v. *Goodman*, 6 CIT 133 (1983) but is not inclined to follow the *discretion* utilized by the court in that decision in applying section 2644.

(Decided November 22, 1983)

George R. Tuttle, P.C. (*Stephen S. Spraitzar* at the trial and on the brief and *George R. Tuttle* at the trial) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Robert H. White* at the trial), for the defendant.

FORD, *Judge:* This action is before the Court for determination of the proper classification of certain merchandise described on the invoices as "Madill type 071" Skidder towers or components thereof.[1] They were classified under item 664.10, Tariff Schedules of the United States, as modified by T.D. 68-9, and assessed with duty at 5.5 percent ad valorem. Said item provides for "elevators, hoists, winches, cranes, jacks, pulley tackle, belt conveyors, and other lifting, handling, loading or unloading machinery, and conveyors, all the foregoing and parts thereof not provided for in item 664.05."

Plaintiff contends the imported merchandise is used for the harvesting of trees, and as such entitled to entry free of duty under item 666.00, TSUS, as agricultural implements. In *United States* v. *Border Brokerage Co.,* 2 CIT 326 (1981) *aff'd, United States* v. *Border Brokerage Co.,* 706 F.2d 1579 (Fed. Cir. 1983), the Court held following the decision in *Norman G. Jensen, Inc.* v. *United States,* 76 Cust. Ct. 42, C.D. 4634; 408 F. Supp. 1379 (1976) *aff'd, United States* v. *Norman G. Jensen,* 64 CCPA 51, C.A.D. 1183, 550 F.2d, 662 (1977) that the harvesting of trees constituted an agricultural pursuit, and merchandise used for such purposes to be within the provision for agricultural implements as provided for in item 666.00, TSUS.

Certain portions of the record in 2 CIT 326, *supra,* were incorporated in the instant case as well as six exhibits. The matter was set for trial in Portland, Oregon, and plaintiff introduced the testimony of four witnesses and fourteen exhibits were received on its behalf. Defendant offered the testimony of one witness and introduced two exhibits.

After the filing of plaintiff's brief, defendant has consented to entry of judgment in lieu of filing a brief. In view of the foregoing, judgment will be entered for plaintiff.

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[1] Entry No. 113855—1 only Madill type 071, serial No. 03925, five drum skidder tower complete with 49' seamless tube spar with fairleads, three guyline blocks and three hydraulic guyline winches. (Less undercarriage); Entry No. 114045—1 only Madill five drum skidder tower model 071, serial No. 03926, complete with 49' seamless tube spar with fairleads, three hydraulic guyline winches and controls. (Less undercarriage); Entry No. 117215—1 only Madill type 071, serial No. 21962, five drum skidder tower, three hydraulic guyline winches, instrument panel and hydraulic controls and operators' cab. (Less undercarriage); Entry No. 117215—1 only Madill type 071, serial No. 21961, five drum skidder tower, three hydraulic guyline winches, instrument panel and hydraulic controls and operators' cab. (Less undercarriage); Entry No. 122148—1 only Madill Model 071 spar tube complete with fairleads and sheaves installed. (Less guyline blocks and straps).

575 F. Supp. 1288

SPECIAL COMMODITY GROUP ON NON-RUBBER FOOTWEAR FROM BRAZIL, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, PLAINTIFF *v.* THE HONORABLE MALCOLM BALDRIGE, SECRETARY OF COMMERCE OF THE UNITED STATES AND, THE HONORABLE DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES AND THE HONORABLE WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 83-3-00458

Before CARMAN, *Judge.*

Memorandum Opinion and Order

[Plaintiff's applications denied; Defendant's cross-motion to dismiss granted.]

(November 23, 1983)

Plaia, Schaumberg, & Dekieffer, Chartered, (*Herbert C. Shelley* on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; (*Velta Melnbrencis* on the motion) for the defendants.

INTRODUCTION

CARMAN, *Judge:* In this action, plaintiff seeks, among other things, a writ of mandamus to compel the Secretary of the Treasury and the Commissioner of Customs to liquidate certain entries of non-rubber footwear imported from Brazil. Plaintiff also moves for a preliminary injunction to enjoin the Secretary of Commerce (a) from issuing a final determination in an annual administrative review of a countervailing duty order under section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (1982), covering January 4, 1980 to December 31, 1980 entries of certain non-rubber footwear from Brazil; (b) from directing the United States Customs Service (Customs) to assess any countervailing duties on those entries greater than the amount already deposited with Customs as estimated countervailing duties; and, (c) from conducting a further administrative review of such entries from January 1, 1981, through September 11, 1981. Defendant cross-moves to dismiss for lack of jurisdiction and failure to state a claim as to which relief may be granted.

The facts in this case are not in issue. In September 1974, a countervailing duty order was issued covering certain non-rubber footwear from Brazil. 39 Fed. Reg. 32,903 (1974). On January 4, 1980, Customs published a notice in the Federal Register suspending liquidation of all entries of non-rubber footwear from Brazil and requiring the deposit of an estimated countervailing duty at the rate of 1 percent on all future entries. 45 Fed. Reg. 1013 (1980) Plaintiff members continued to deposit estimated countervailing duties for entries in the amount of 1 percent pursuant to the notice of January 4, 1980. The Department of Commerce (Commerce, which had assumed the duties of administering the countervailing duty laws from the Treasury Department, indicated on March 9, 1983, *see* 48 Fed. Reg. 9901 (1983), that it had conducted a preliminary administrative review and had preliminarily determined that net subsidies on exports from December 7, 1979, through December 31, 1979, were 4.77 percent and that net subsidies on exports from January 1, 1980 to December 31, 1980 were 3.48 percent. *Id* at 9903. The Department of Commerce has not indicated when the final administrative review for 1980 entries will be completed.[1] Commerce has not indicated whether the net amount of the bounty paid or bestowed upon non-rubber footwear from Brazil will be higher or lower than the 1 percent ad valorem rate that has been collected as estimated countervailing duties upon entry.

Plaintiff commenced this action on March 30, 1983, more than 3 years after the publication of notice of January 4, 1980, suspending liquidation. The plaintiff asserts that, pursuant to 19 U.S.C. § 1504 (1982), all entries must be liquidated within 1 year from the date of entry unless, among other reasons, liquidation is suspended as required by statute or court order.[2] Plaintiff also claims that this court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (Supp. V 1981),[3] since the subject matter of this action arose out of 19 U.S.C.

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[1] The International Trade Commission (ITC) apparently informed the Commerce Department on October 29, 1981, that it had received a request for an injury determination as provided in section 104(b)(1) of the Trade Agreements Act of 1979, 19 U.S.C. § 1671 note (1982) with regard to non-rubber footwear from Brazil. Commerce was to suspend the liquidation of entries made on or after October 29, 1981, and collect estimated countervailing duties pending the determination of the ITC. The ITC determined on May 24, 1983, that an industry in the United States would not be materially injured or threatened with material injury, nor would the establishment of an industry in the United States be materially retarded by reason of imports of certain non-rubber footwear from Brazil covered by the outstanding countervailing duty order if the order were to be revoked. *See* 48 Fed. Reg. 24,796 (1983). Commerce, pursuant to section 104(b)(4) of the Trade Agreements Act of 1979, 19 U.S.C. § 1671 note, and as the administering authority, presumably will revoke the countervailing duty order in effect with regard to non-rubber footwear from Brazil, and refund, without interest, any estimated countervailing duties collected during the period of suspension liquidation (which commenced on October 29, 1981). Accordingly, it would seem non-rubber footwear from Brazil entered since October 28, 1981 will not be affected by continuing section 751, 19 U.S.C. § 1675(a), administrative reviews.

[2] 19 U.S.C. § 1504(a), (b)(1982) provides:

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) The date of entry of such merchandise;
(2) The date of the final withdrawal of all such merchandise covered by a warehouse entry; or
(3) The date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—

(1) Information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
(2) Liquidation is suspended as required by statute or court order; or
(3) The importer, consignee, or his agent requests such extension and shows good cause therefor.

[3] 28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United State, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) Revenue from imports or tonnage;

Continued

§ 1504, and concerns the liquidation of entries subject to a countervailing duty order. Plaintiff declares further that this court should assume jurisdiation in this matter pursuant to 28 U.S.C. § 1581(i), since sections 701-707 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671-1671f (1982) cover assessments of countervailing duties against subsidized imports to the United States.

Defendant contends that a preliminary determination to suspend liquidation of entries pending a section 751 annual review to assess countervailing duties in the liquidation of entries can only be reviewed pursuant to 19 U.S.C. § 1516(a) and 28 U.S.C. § 1581(c) (Supp. V 1981) when there has been a final administrative determination. Defendant cites *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 687 F.2d 467 (1982), for the proposition that the judicial review provisions of 19 U.S.C. § 1516(a) (1982) cannot be circumvented by characterizing a challenge to preliminary decisions during the course of a section 751 administrative review of a countervailing duty order as an action to enforce the provisions of 19 U.S.C. § 1504(a), invoking the jurisdiction of the court pursuant to 28 U.S.C. § 1581(i).

The court concludes, for the reasons set forth below, that although subject matter jurisdiction exists under 28 U.S.C. § 1581(i), the action must be dismissed for failure to state grounds under which relief can be granted.

The initial question is whether this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) enabling it to compel Customs to liquidate merchandise after 1 year from date of entry while a section 751 annual review is in progress.

In *American Air Parcel Forwarding Co.* v. *United States*, 1 CIT 293, 515 F. Supp. 47 (1981), the court, while examining the statutory and regulatory authority of the Customs Service to receive uncertified checks, construed the jurisdictional provisions of the Customs Court Act of 1980 and stated:

> [T]his case comes within the board "residual grant of jurisdictional authority" of this court as described in 28 U.S.C. § 1581(i) * * * In particular, paragraphs (i) (1) and (4) confer jurisdiction over any civil action
>
> "That arises out of any law of the United States providing for—
>
> "(1) Revenue from imports or tonnage
>
> * * * * * * *
>
> "(4) Administration and enforcement with respect to matters referred to in paragraphs (1)-(3) of this subsection * * *"

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(2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) Administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(b) of this section.

> This court's jurisdiction over plaintiff's cause of action "arises out of [a] law of the United States" * * * and the Customs Service's administration and enforcement of its regulations.

ID. at 295, 515 F. Supp. at 50.

This analysis is instructive in the matter at hand. The instant case is concerned with laws providing for revenue as well as the administration and enforcement of regulations of the Customs Service.

The difference between *American Air Parcel* and the instant matter is the former construed a statute and regulations concerning the acceptance of uncertified checks while the latter has been presented with statutes to construe, i.e. 19 U.S.C. § 1504 and § 1675 in regard to liquidation and countervailing duty review.

In *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 687 F.2d 467 (1982), the court established that while the jurisdictional grant under 28 U.S.C. § 1581(i) is in addition to the jurisdiction conferred upon this court in subsections (a)–(h) of 28 U.S.C. § 1581, Congress did not intend *generally* that § 1581(i) be used to circumvent subsections (a)–(h) of 28 U.S.C. § 1581.

In the concurring opinion of Judge Nies in *Uniroyal*, which was cited by the majority with approval [4], the notion was expressed.

> [T]he broad subject matter jurisdiction of the court under § 1581(i) may be invoked only when no other remedy is available or the remedies provided under other provisions of 28 U.S.C. § 1581 are manifestly inadequate.

United States v. *Uniroyal, Inc.*, 69 CCPA at 187, 687 F.2d at 475 (Nies, J., concurring).[5]

In *Uniroyal*, although the court spoke of jurisdiction, its concern was what administrative and judicial remedies were available and when subsections of 28 U.S.C. § 1581 should be used or invoked in pursuit of those remedies.

Whether or not a complaint states a claim upon which relief may be granted should not be confused with the threshold question of the jurisdiction of the court over the subject matter.

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[4] The majority stated: "[T]he legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest." *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 184, 687 F.2d 467, 472 (1982). Further, the majority wrote: "As the concurring opinion indicates, this construction is consistent with pre-1980 precedent from the district courts." *Id.* at 184 n.15, 687 F.2d at 472 n.15.

[5] Judge Nies noted that prior to the enactment of the Customs Court Act of 1980, Pub. L. No. 96–417, § 201, 94 Stat. 1727, 1728–29, federal courts were consistent in holding that section 1581(i) jurisdiction was available only where the other section 1581 remedies were manifestly inadequate. "The precedent with respect to the *exercise* of jurisdiction by district courts, whose subject matter jurisdiction was transferred to the Court of International Trade by § 1581(i), generally reflects this standard." *United States* v. *Uniroyal, Inc.*, 69 CCPA at 187 n.9, 687 F.2d at 475 n.9 (Nies, J., concurring) (emphasis added) (citing *United States Cane Sugar Refiners' Ass'n.* v. *Block*, 69 CCPA 172, 175 n.5, 683 F.2d 399, 402 n.5 (1982); *Jerlian Watch Co.* v. *United States Department of Commerce*, 597 F.2d 687, 692 (9th Cir. 1979) (per curiam); *Flintkote Co.* v. *Blumenthal*, 596 F.2d 51, 58 (2d Cir. 1979); *Sneaker Circus, Inc.* v *Carter*, 566 F.2d 396, 399 (2d Cir. 1977); *Timken Co.* v. *Simon*, 539 F.2d 221, 226 n.7 (D.C. Dir. 1976)). Judge Nies went on to note that simply because "the controversy may not be ripe for review under § 1581(a) does not make the remedy inadequate." *Uniroyal*, 69 CCPA at 187 n.9, 687 F.2d at 475 n.9 (Nies J., concurring) (citing *J. C. Penney Co.* v. *United States Treasury Department*, 439 F.2d 63, 68 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971)).

In *Bell* v. *Hood*, 327 U.S. 678 (1946), the Court held subject matter jurisdiction of a court cannot be defeated on the theory that the allegations of the plaintiff fail to state grounds upon which relief may be granted. The Court observed:

> [F]ailure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of [subject matter] jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and just as issues of fact, it must be decided *after* and *not before* the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682 (emphasis added).

In *Bush* v. *State Industries Inc.*, 599 F.2d 780 (6th Cir. 1979), the court pointed out that in determining whether a federal court has jurisdiction over the subject matter, it must ascertain whether the case arises under the Constitution or federal statutes and has not been advanced solely to obtain federal jurisdiction. Whether a complaint fails to state a claim upon which relief can be granted is irrelevant to the question of subject matter jurisdiction.

This analysis of federal jurisdiction (under 28 U.S.C. § 1331 (Supp. V 1981) is directly applicable when considering Court of International Trade jurisdiction under section 1581(i). *See American Air Parcel Forwarding Co.*, 1 CIT at 296, 515 F. Supp. at 51. Indeed, just as the plaintiff in *Bell* v. *Hood* was entitled to have his claim heard in federal court because his complaint was "so drawn as to seek recovery" under federal law, so too the plaintiff in the instant case may assert section 1581(i) jurisdiction since the gravamen of the complaint seeks relief which "arises out of" laws relating to "revenue from imports" and "administration and enforcement" with respect to international trade matters. This is so irrespective of any substantive attacks against the complaint.[6]

Having decided that the court has subject matter jurisdiction, it must be determined whether or not the plaintiff's allegations state a claim upon which relief may be granted. The court holds they do not.

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[6] In *PPG Industries, Inc.* v. *United States*, 2 CIT 110, 525 F. Supp. 883 (1981), which predated *Uniroyal*, a case bearing facts quite similar to those in the matter at bar, the plaintiff brought suit challenging the authority of the International Trade Administration to deny a request for a disclosure conference in connection with a section 751 antidumping duty order. The plaintiff asserted jurisdiction under section 1581(i). It was quite clear in *PPG Industries* that the plaintiff was attempting to have the court review a purely interlocutory decision. The court quite correctly deemed this inappropriate and dismissed the action. Notably, however, the dismissal was on the ground that the plaintiff had failed to state a claim as to which relief may be granted. Jurisdiction was presupposed to have existed under section 1581(i). Indeed, in that case the government conceded as much:

> We recognize that this Court has subject matter jurisdiction over claims of the type PPG now brings; we contend, however, that any cause of action PPG may eventually have has not yet accrued and thus may not be maintained at this time.

Defendant's Reply Memorandum at 1-2, *PPG Industries, Inc.* v. *United States*, 2 CIT 110, 525 F. Supp 883 (1981); *see Wear Me Apparel Corp.* v. *United States*, 1 CIT 194, 196, 511 F. Supp. 814, 817 (1981) ("section 1581(i) does not require the filing or denial of a protest as a prerequisite for the exercise of jurisdiction by this court").

Where administrative proceedings are in process, and the agency has not adopted a final decision, the matter is generally not ripe for judicial review. *See Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-49 (1967); *Krupp Stahl AG* v. *United States,* 4 CIT 244, 533 F. Supp. 394 (1982). The facts in the instant case indicate that Commerce has not completed the administrative review for the 1980 entries and the possibility exists that the final agency determination may indicate that there were no subsidies, in which event the plaintiff would presumably find no reason to complain. In the interest of efficient agency action, interlocutory determinations should not be considered when final agency decisions are judicially reviewable. *See PPG Industries, Inc.* v. *United States,* 2 CIT 110, 112, 525 F. Supp. 883, 884-85 (1981).

Plaintiff, alleging irreparable harm, has requested preliminary injunctive relief. The court denies such relief for the reasons assigned below.

The relevent factors for determining whether or not an injunction should issue were set out in *S. J. Stiles Associates Ltd.* v. *Snyder,* 68 CCPA 27, 646 F.2d 522 (1981):

> (1) A threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favored [movant].

Id. at 30, 646 F.2d at 525.

In *American Air Parcel, supra,* the court pointed out that although the plaintiff bears the burden of persuasion, the movant is not required to sustain the high burden of proof as to each of the four factors. The balance of hardship test permits the court flexibility and sound discretion in applying the four factors in granting or denying a request for preliminary injuctive relief. 1 CIT at 298, 515 F. Supp. at 52.

Plaintiff contends its members will be irreparably harmed if Commerce completes its administrative review for the 1980 entries and continues its 1981 review, arguing its members have already sold merchandise included in the 1980 entries and will further be forced to endure business uncertainty occasioned by contingent and unknown economic and tax liabilities. This court cannot agree that this harm complained of is of the magnitude contemplated for the issuance of a preliminary injunction. This court does not find plaintiff will suffer irreparable harm by awaiting the final agency determination.

Furthermore, judicial review must properly await final determination when the issues are ripe. *Abbott Laboratories,* 387 U.S. at 148-49; *Krupp Stahl AG,* 4 CIT 244, 553 F. Supp. 394.

The Court now turns to plaintiff's request for a writ of mandamus. The court finds the application inappropriate and premature. Mandamus is an extraordinary remedy and should be employed only when necessary and when no meaningful alternatives are available. *Canadian Tarpoly Co.* v. *United States International Trade Commission,* 68 CCPA 121, 123, 640 F.2d 1322, 132 (1981). In this case, plaintiff must await the final determination to find relief.

It is, therefore, ordered and adjudged:

1. Plaintiff's application for a writ of mandamus is denied;

2. Plaintiff's application for a preliminary injunction to enjoin the Secretary of Commerce from issuing a final determination in the section 751 administrative review of the countervailing duty order covering January 4, 1980 through December 31, 1980 entries of certain non-rubber footwear from Brazil is denied;

3. Plaintiff's application to enjoin the Secretary of Commerce from directing the United States Customs Service to assess any countervailing duties on those entries greater than the amount already deposited with Customs as estimated countervailing duties is denied;

4. Plaintiff's application for a preliminary injunction to enjoin the Secretary of Commerce from conducting an administrative review of January 1, 1981 through September 11, 1981 entries of non-rubber footwear from Brazil covered by an outstanding countervailing duty order is denied;

5. Defendant's cross-motion to dismiss for failure to state a claim as to which relief may be granted is granted.

It is so ordered.

UNITED STATES, PLAINTIFF *v.* CARL ROSS, INDIVIDUALLY, AND ROSS GLOVE COMPANY, DEFENDANTS

Court No. 83-3-00440

Before CARMAN, *Judge.*

Memorandum Opinion and Order

[Motion to dismiss denied.]

(Dated November 28, 1983)

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division; (*A. David Lafer* on the motion) (*Kathleen A. Bucholtz,* Assistant Regional Counsel, United States Customs Service, of counsel, on the memorandum) for the plaintiff.

Law Offices Treumann, (*Walter Treumann,* on the motion) for the defendants.

CARMAN, *Judge:* Plaintiff seeks to enforce a claim for penalties and duties concerning certain merchandise imported by defendants in 1978, asserting that false entry documents were filed by defendants resulting in an undervaluation of $304,611.78.

The United States Customs Service (Customs), pursuant to 19 U.S.C. § 1592 (1982) and the applicable regulations, issued on February 24, 1983 a prepenalty notice to defendants who duly responded. Customs issued thereafter on March 11, 1983 a penalty claim notice which indicated that any petition for mitigation or remission would have to be filed within 7 days of the date of the penalty claim notice. Defendants objected, contending 7 days was too short a time and did not file a petition for mitigation or remission. Plaintiff commenced this action. Defendants move to dismiss for want of subject matter jurisdiction, lack of due process, and on estoppel grounds.

Initially, the court must address the question of subject matter jurisdiction. The defendants contend they were not given adequate notice regarding the penalty claim, and that, therefore, the plaintiff was not entitled to proceed with court action. The plaintiff contends that notice was given under 19 C.F.R. § 162.32(a) (1983), thus enabling the court to maintain jurisdiction. For the reasons that follow, the court holds that it does have subject matter jurisdiction in this case.

Preliminarily, the plaintiff notes that Count IV of the amended complaint seeks only to collect the duties lawfully owed and not fines or penalties. Therefore, the plaintiff contends that defendants arguments are irrelevant in regard to Count IV.

Defendants position seems to assume that because the statutory provision enabling the United States to collect duties is contained within the same section that outlines the penalty [1] assessment procedures that those procedures are applicable to a duty claim brought by the United States. Any such assumption clearly is in error.

Section 1592(d), taken at face-value, demonstrates that the United States need not follow the elaborate penalty procedures when pursuing a duty claim. Subsections (b) and (c) of § 1592 are cast in such terms as "monetary penalty" or "penalty claim." Subsection (d) alone deals with "lawful duties" and makes no reference to the preceding matters.[2] Such was the understanding of the Customs Service and is reflected in the implementing regulations. *See* 19 C.F.R. §§ 162.79, .79(b) (1983).

Section 162.79(b) simply states that such lawful duties are to be restored within 30 days of the written notice, and that application may be made to the Commissioner of Customs for review. Thus, the provisions concerning the prepenalty notice, penalty notice, etc., do not apply when the United States is seeking restoration of lawful duties. The government fulfilled its obligation in this respect by the March 16, 1983 letter from the District Director to the defendant. *See* Defendants Exhibit 5. Since the defendant has not as yet deposited the requested duties, pursuant to a proper and lawful demand, the court has jurisdiction to entertain Count IV of the amended complaint.

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[1] The United States seeks ot enforce its duty claim pursuant to 19 U.S.C. § 1592(d) (1982), which reads in part:

> [I]f the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.

Id. This subsection was added by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110(a) 92 Stat. 888, 896, in order to remedy the problems relating to the finality of liquidations. The United States, pursuant to § 1592(d), may seek the restoration of duties even though a particular entry and liquidation have become final within the meaning of 19 U.S.C. § 1514(a) (1982).

[2] The legislative history of section 1592(d) demonstrates that a duty claim brought by the United States is insulated from the extensive penalty procedures given in section 1592(b). Materials attending the passage of the Customs Procedural Reform and Simplification Act of 1978 clearly show that Congress' concern with procedural reform was relative to the penalty and fraud provisions only, not the collection of lost duties. *See* S. Rep. No. 778, 95th Cong., 2d Sess. 18-22 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2230-32; H.R. Rep. No. 621, 95th Cong., 1st Sess. 2, 16 (1978).

The remaining counts seek the imposition of fines and/or penalties for violations of the Customs laws. The defendants maintain that contrary to statutory and due process standards, no reasonable opportunity to respond to the penalty notice was given, thus depriving the court of subject matter jurisidiction.

Section 1592(b)(2) specifies that a person against whom a penalty claim has been issued "shall have a reasonable opportunity * * * [to seek] remission or mitigation of the monetary penalty." 19 U.S.C. § 1592(b)(2)(1982).[3] It is the defendants' position that in giving 7 days to respond to the penalty claim, Customs violated this section and deprived them of due process.

In allowing only 7 days to file a petition for mitigation, Customs was acting pursuant to 19 C.F.R. § 162.32(a)(1983).[4] This regulation was promulgated in response to changes in the customs laws brought about by the Customs Procedural Reform and Simplification Act of 1978. Among other changes, the 1978 Act shortened the statute of limitations in cases of negligent and grossly negligent violations of the customs laws.[5] Thus, sections 162.32 and 162.78 of 19 C.F.R. authorizes the reduction of the period to respond to a prepenalty and penalty notice to not less than 7 days in cases where the statute of limitations is in danger or running out.

Defendants' contention that 19 C.F.R § 162.32(a)(1983) abridges their statutory right to a "reasonable opportunity" to respond is without merit. The Secretary is authorized to make "regulations as may be necessary to carry out the provision of this chapter." 19 U.S.C. § 1624 (1982). Further, the administering agency is to be accorded "great deference" by the courts in determining whether a regulation conforms to the statutory mandate. *See, e.g., Forester* v. *Consumer Product Safety Commission,* 559 F.2d 774, 783 (D.C. Cir. 1977). There is no doubt that Customs was sensitive to the concerns of the importing public when it promulgated section 162.32(a).[6] After weighing the competing interests issue, Customs deemed 7 days to be a "reasonable period."

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[3] A two-stage administrative procedure is contemplated by section 1592 in connection with penalty assessment. First, if a Customs officer has reasonable cause to believe a violation of the section 1592(a) prohibition has occurred, he is directed by the statute to issue a prepenalty notice. *See* 19 U.S.C. § 1592(b)(1)(A)(1982). Then, after due consideration of any representations the alleged violator may have made in response to the notice, the officer is directed to arrive at a determination as to the penalty or fine. In the event the officer finds that there was a violation of section 1592(a), he must issue a penalty notice, in writing, to the party concerned. The alleged violator must, according to the statute, be given a reasonable opportunity in which to file a petition for remission or mitigation. After these representations are heard and evaluated, the officer arrives at a final determination.

[4] 19 C.F.R. § 162.32(a)(1983) provides in part:

Fines, penalties, and forfeitures.

If any person who is liable for a fine, penalty, or claim for a monetary amount, or who has an interest in property subject to forfeiture, fails to petition for relief under Part 171 of this chapter, or fails to pay or to arrange to pay the fine or penalty within 60 days from the mailing date of the violation notice provided in § 152.31 * * *, and fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense, the district director may specify in the notice a reasonable period of time shorter than 60 days, but not less than 7 days, for the filing of a petition for relief.

[5] Public Law 95–410, the Customs Procedural Reform and Simplification Act of 1978, altered the method for calculating the accrual of the statute of limitations. Prior to the amendment, Customs had 5 years from the discovery of a violation to commence an action. This 5-year period applied irrespective of the level of culpability involved in the alleged violation. Section 110(e) of public law 95–410, however, created distinctions among these levels of culpability (fraud, gross negligence, and negligence) relative to the severity of penalties as well as the accrual of the statute of limitations. The accrual for alleged violations based on fraud remained the same; namely, 5 years from discovery. But, with respect to alleged violations based on negligence or gross negligence, the accrual date was changed to the date upon which the alleged violation was committed. This change, in effect, shortened the period of limitations in negligence and gross negligence cases. *See* 19 U.S.C. § 1621 (1982).

In addition, defendants have offered no identifiable evidence substantiating their assertion that 7 days is unreasonably burdensome. The regulations are exceedingly general as to the preparation and contents of a petition for mitigation. *See* 19 C.F.R. § 171.11(c)(3)(1983). Compliance within 7 days cannot be said to be an unreasonable burden.

With regard to the constitutional argument, the discussion above a fortiori establishes the validity of the agency action under due process analysis. The regulation in question is reasonable and defendants were given the opportunity to exercise their rights under it. No due process in the substantive or procedural sense was withheld here.

Alternatively, defendants argue that section 162.32(a) should not be given effect because it is contradictory to 19 C.F.R. § 171.12(b)(1983). The latter provision reads:

> *When filed.* Petitions for relief shall be filed within 60 days from the date of the mailing of the notice of fine, penalty, or forfeiture incurred, unless additional time has been authorized as provided in § 162.32(a) of this chapter.

Id. Defendants maintain that the 60 days allowable pursuant to 171.12(b) is contradictory to the 7 days permissible under 162.32(a) and that they should be given the benefit of the more favorable regulation. The two provisions, however, are complementary. The 60-day provision is of general application to those proceedings commenced before the effective date of the amendments of the 1978 Act. Section 162.32(a), on the other hand, deals with the exceptional situation where the statute of limitations is involved and more rapid administrative procedures are appropriate. The provisions, therefore, cover two clearly distinguishable situations.

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[6] [Commenters] contended that when a shorter time period is required because less than 1 year remains before the statute of limitations may be asserted as a defense (section 162.78), the shorter period should not be less than 14 days, rather than 7 days, and the date on which any shorter period shall commence should be the date on which the notice was received by the person, rather than the date on which the notice was mailed by Customs.

* * * * * * *

> In cases where less than 1 year remains before the statute of limitations may be asserted, the 7-day period is a minimal time for response, and a district director may provide a longer period if the delay will not prejudice the Government's ability to enforce the claim.
>
> Customs considers it essential to the enforcement of this provision that the period for response commence with the mailing of the notice.

T.D. 79-160, 13 Cust. B. 398, 406–07 (1979); *See id.* at 409.

The defendant next asserts that section 162.32(a) is "deeply buried in an inappropriate part of the regulations." Defendants Memorandum in Support, at 12. This argument lacks merit for several reasons. The passage of the 1978 Act impelled Customs to promulgate a new set of regulations. It was necessary, therefore, at least for a time, to have two sets of regulations in operation. *See* 43 Fed. Reg. 53,453 (1978). Further, section 171.12(b) makes specific reference to section 162.32.[7]

In sum, the notice given to the defendants was reasonable and in conformity with the applicable statute. Since no petition for remission or mitigation was filed within the 7 days, the plaintiff was entitled to file suit. The court has subject matter jurisdiction over the penalty-seeking counts in the amended complaint.

The defendants urge next that plaintiff should be estopped from limiting defendants' time to petition for mitigation to only 7 days pursuant to section 162.32(a) because of events that allegedly occurred on March 14, 1983. Defendants maintain that through counsel they phoned the Regional Counsel's office of Customs and received incomplete information concerning the time limit of only 7 days to petition for mitigation. Defendants assert that they relied upon incomplete information and wrote to Customs asking for more time. Defendants assert, based upon these events, that plaintiff should be estopped from insisting upon the 7-day time period pursuant to section 162.32(a).

Even if the facts were as defendants allege, estoppel will not lie in a case such as this. To work an estoppel on the government, mere erroneous responses to oral inquiries is insufficient. *Schweiker* v. *Hansen,* 450 U.S. 785, 788 (1981) (per curiam); *see Cheers* v. *Secretary of Health, Education & Welfare,* 610 F.2d 463, 469 (7th Cir. 1979), *cert. denied,* 449 U.S. 898 (1980). Accordingly, the defendants' estoppel argument is without merit.

Lastly, defendant requests that the court deem counsel's letter of March 18, 1983 to the acting district director a petition for mitigation. Such a request offends logic in that the letter states, "We regret that we cannot in the time allotted to us respond to the Penalty Notice except to advise you that Carl Ross and Ross Glove Company neither violated the law nor committed false or fraudulent acts of [sic] omissions." Defendants Exhibit 6, at 1. The letter goes on to cite section 171.12 and requests that 60 days be given to respond.

The letter reflects none of the contents that section 171.11 specifies for petitions of this kind. It cannot be fairly said that the letter asks for anything more than an extension of time.

For the reasons outlined above, the defendants' motion to dismiss is denied in all respects.

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[7] Nor is defendant's argument persuasive that the headnotes are misleading. As Judge Maletz has written, "[S]ection headings to statutory provisions are not generally delimiting." *United States* v. *Murray,* 5 CIT 102 (1983).

577 F. Supp. 1016

THE AMBASSADOR DIVISION OF THE FLORSHEIM SHOE COMPANY, A DIVISION OF INTERCO INCORPORATED, PLAINTIFF v. UNITED STATES, ET AL., DEFENDANT, AND FOOTWEAR INDUSTRIES OF AMERICA, INC., INTERVENOR

Court No. 82-2-00233

Before FORD, *Judge.*

On Plaintiff's Motion for Review of Administrative Determinations upon Agency Record

The suspension of liquidation and the retroactive assessment of countervailing duty found to be due by virtue of a periodic review made under 19 U.S.C. 1675(a), *held* to be invalid.

[Plaintiff's motion for Summary Judgment granted.]

(Dated December 1, 1983)

Sonnenberg & Anderson (Steven P. Sonnenberg on the brief, and *Paul S. Anderson,* of counsel) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division (*A. David Lafer* and *Francis J. Sailer* on the brief) for the defendant.

Collier, Shannon, Rill & Scott (*Lauren R. Howard* and *Michael R. Kershow* on the brief) for the intervenor.

Plaia & Schaumberg (*Herbert C. Shelley* and *Tom M. Schaumberg* of the brief) for the Special Commodity Group on Nonrubber Footwear from Brazil, of the American Association of Exporters and Importers, Amicus Curiae.

Daniels, Houlihan & Palmeter (*Donald B. Cameron* on the brief) for Volume Footwear Retailers of America, Amicus Curiae.

FORD, *Judge*: This civil action instituted by plaintiff, an importer of leather footwear from India, contests the final results of the first periodic review conducted pursuant to 19 U.S.C. 1675(a) by the United States Department of Commerce, International Trade Administration (ITA), with respect to a countervailing duty order covering such merchandise. Said order was published in the Federal Register on February 17, 1982 (47 Fed. Reg. 6906 et seq.)[1] and covers importations of the subject leather footwear between January 1, 1980 and December 31, 1980.

The action is before the court on a motion pursuant to Rules 56 and 56.1 of the Rules of this Court for a "Review of Administrative Determinations upon An Agency Record" and for summary judgment. Plaintiff's primary contention is that the ITA acted contrary to law and in conflict with United States international treaty obligations by ordering suspension of liquidations and retroactive assessment of countervailing duties. Defendant and intervenor have cross-moved for summary judgment.

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[1] The original countervailing duty order was published in the Federal Register on October 26, 1979 (44 Fed. Reg. 61588.)

On March 14 and April 15, 1983 the motions to appear as amici-curiae of Volume Footwear Retailers of America, Inc. and The Special Commodity Group on Nonrubber Footwear from Brazil of the American Association of Exporters and Importers were granted.

The facts material to this motion as reflected in the administrative record indicate that on October 26, 1979 the Secreatry of the Treasury issued a final countervailing duty determination (T.D. 79-275) pursuant to 19 U.S.C. 1303 (1976). The determination was published in the Federal Register (44 Fed. Reg. 61588) and set forth net subsidies of 4.24 percent ad valorem for leather footwear and 1.01 percent ad valorem for leather uppers (lasted and unlasted) from India. Since the unlasted leather uppers were subject to duty free entry, the notice directed that liquidation of future entries of said merchandise be suspended pending the results of an investigation by the United States International Trade Commission (ITC). Liquidations were also ordered suspended for all entries covered by T.D. 79-275 by order of the United States Customs Service on November 9, 1979.

The ITC on March 26, 1980 published its determination in the Federal Register (45 Fed. Reg. 19678) that imports of unlasted leather uppers from India were not materially injuring or threatening a domestic industry and thereby effectively terminated the proceeding with respect to said merchandise. On May 12, 1980 the ITA (to which the authority to administer antidumping and countervailing duty laws had been transferred on January 2, 1980) published notice of intent to conduct administrative reviews pursuant to 19 U.S.C. 1675(a) of all outstanding countervailing duty orders including T.D. 79-275. Thereafter, on August 22, 1980, a Customs telex issued at the direction of the ITA ordered customs officers to continue to suspend liquidation of entries subject to T.D. 79-275 until further notice.

The preliminary results of its review of T.D. 79-275, covering the period from January 1, 1980 through December 31, 1980, was published in the Federal Register (46 Fed. Reg. 40781) on August 12, 1981. Three programs were reviewed by the ITA, including short-term preferential financing, special tax deductions for export expenses, and the cash compensatory support program.

Since India refused to present evidence to the contrary, the ITA determined, that based upon the best information available, the ad valorem rates of new subsidies to be 15.08 percent for leather footwear and 12.58 percent for lasted leather uppers.

The notice stated that estimated duties shall continue to be required in accordance with rates set forth in the Department of Treasury's outstanding countervailing duty order, i.e. 4.24 percent for leather footwear and 1.01 percent for lasted leather uppers. Interested parties as defined in 19 U.S.C. 1677(9) submitted written comments on these preliminary results and a hearing was held on October 19, 1981.

A final determination, confirming the preliminary results, was made on February 17, 1982 and published in the Federal Register (47 Fed. Reg. 6906). Said notice directed customs officers to assess countervailing duties at 15.08 percent and 12.58 percent on shipments of Indian leather footwear and lasted leather uppers, respectively, entered between January 1, 1980 and December 31, 1980. The notice further directed that estimated countervailing duties in these amounts be posted for all entries made after February 17, 1982, and that suspension of liquidations previously ordered remain in effect for all shipments exported on or after January 1, 1981 until completion of the next periodic review pursuant to 19 U.S.C. 1675(a).

Plaintiff contends the suspension of liquidations and the retroactive assessment of countervailing duty, as ascertained by the periodic review, are contrary to law. Defendant urges assessment of the redetermined countervailing duties is required by law.

Since the original countervailing duty order covering the merchandise at bar was promulgated prior to the enactment of the Trade Agreements Act of 1979, it is noted that 19 U.S.C. 1303 (1976) constituted the entire countervailing duty law at that time. Under the law as it then existed a determination of injury by the ITC was required only when the subsidized merchandise was entitled to duty free entry.

The Trade Agreements Act of 1979, effective January 1, 1980, enacted a new countervailing duty law, Title XII of the Tariff Act of 1930, as amended, which was subsequently reported as Subtitle IV, Chapter 4, Title 19, United States Code. One of the major purposes of the Act was to approve the multilateral trade agreements concluded in 1979 and to implement substantive provisions of United States law. Among the agreements reached during the multilateral trade negotiations was the agreement on Interpretation and Application of Articles VI, XVI, XXII of the General Agreement on Tariffs and Trade ("Subsidies Code"). Signatories to the Subsidies Code agreed to impose countervailing duties on all subsidized merchandise after a determination that said merchandise had caused or threatened to cause material injury to a domestic industry. *See* S. Rep. No. 249, 37–38. The United States accepted the Subsidies Code with the qualification that the "injury test" would be applicable only to those countries who were signatories to the code. *See* S. Rep. No. 249, 13. Accordingly, the injury test was applied only to new investigations when the merchandise was imported from a country under the agreement. For countries not under the agreement the law would continue to authorize the imposition of countervailing duties without an injury test. *Id.* 43–44.

In order to implement this system Congress amended 19 U.S.C. 1303 by repealing its former subsections (a), (3) through (6), (b) and (c) and by adding a new section (b), which provides in pertinent part as follows:

> (b) The duty imposed under subsection (a) of this section shall be imposed under regulations prescribed by the administering authority * * *, in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) except that, in the case of any imported article or merchandise which is not free of duty—
>
> (1) no determination by the United States International Trade Commission * * * shall be required.
>
> * * * * * * *
>
> (4) Any reference to determinations by the Commission * * * shall be disregarded.

In addition the Trade Agreements Act of 1979 under Section 104(c) provided that existing countervailing duty orders shall remain in effect and be subject to reviews under 19 U.S.C. 1675(a). This was the second major qualification to the acceptance of the Subsidies Code by the United States. By virtue of this qualification an injury test was not required to maintain countervailing duty orders issued prior to the 1979 act. However, the countervailing duty order was subject to a periodic review.

As in the case at bar, the merchandise involved in *Industrial Fasteners Group, American Importers Association* v. *United States*, 710 F.2d 1576 (Fed. Cir. June 30, 1983) came from India. In that case the appellate court held India not to be "a country under the agreement" and the old law contained in 19 U.S.C. 1303 governed. Section 1671(c) of the 1979 Act indicates that in the case of merchandise which is a product of a country which is not a signatory to the agreement, Section 1303 controls. Section 1303(b) provides as follows:

> (b) The duty imposed under subsection (a) of this section shall be imposed, *under regulations prescribed by the administering authority (as defined in section 1677(1) of this title), in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties)* except that, in the case of any imported article or merchandise which is not free of duty—
>
> (1) no determination by the United States International Trade Commission under section 1671b(a), 1671c, or 1671d(b) of this title shall be required,
>
> (2) an investigation may not be suspended under section 1671c(c) of this title,
>
> (3) no determination as to the presence of critical circumstances shall be made under section 1671b(e) or 1671d(a)(2) or (b)(4)(A) of this title, and
>
> (4) any reference to determinations by the Commission, or to the suspension of an investigation under section 1671c(c) of this title which are not permitted or required by this subsection shall be disregarded. [Italics added.]

As indicated *supra* it is plaintiff's and amici curiae's position that both the suspension of liquidation and the retroactive assessment of countervailing duties by Customs are contrary to law. It is noted that Section 1303(b) requires duty be imposed under regulations prescribed by the administering authority. Examination of the regulations issued by Commerce under the authority of Section 1303(b) indicates there are no regulations relating to suspension of liquidation. There is however a regulation (19 CFR 355.41 (1980)) relating to periodic review. Additionally, Section 335.37, entitled "Differences in determined and estimated countervailing duties", appears to be the only remaining regulation, issued by the Department of Commerce, covering countervailing duties. It reads as follows:

> If the amount of the estimated countervailing duty deposited pursuant to a Preliminary Affirmative Determination is different from the amount of the countervailing duty to be assessed pursuant to a Countervailing Duty Order, the difference with respect to merchandise entered, or withdrawn from warehouse, for consumption before publication of notice of the Commission's affirmative final determination or, in those investigations involving dutiable merchandise from non-agreement countries, the Secretary's final determination shall be:
>
> (a) Disregarded, to the extent that the estimated duty is less than the duty determined to be assessable under the Order; or
>
> (b) Refunded, to the extent that estimated duties collected were more than the duty determined to be assessable under the Order.

The Court finds the above regulation, while relating to countervailing duties does not cover the procedure as to such duty determined to be due as a result of a periodic review as set forth in 19 U.S.C. 1675(a).

A further review of 19 CFR establishes that customs regulations contained in Subpart E, Sections 159.51 to 159.58 cover suspension of liquidation. The only provision covering the suspension of liquidation in countervailing duty matters is Section 159.58(b). All other suspension provisions are in matters covering "Notice of Preliminary Affirmative Countervailing Duty Determination", "Notice of Final Affirmative Countervailing Duty Determination", or "Notice of Violation of Agreement", as provided by Part 355, Chapter 3 of this title. Nowhere in 159.58(b) is there a provision for suspension of liquidation as a result of a periodic review.

Both parties have additionally urged the utilization of 19 U.S.C. 1671(f), "Treatment of difference between deposit of estimated countervailing duty and final assessed duty under countervailing duty orders", to sustain their positions as to the collection or noncollection of any increased countervailing duties. Plaintiff contends 1671f(a) is controlling while defendant and intervenor claim 1671(b) is applicable. A reading of both sections establishes neither section may be utilized since both require specific conditions. Section 103 of the Trade Agreements Act of 1979 provides in the case of a nonsignatory country countervailing duty "shall be imposed, under regulations prescribed by the administering authority * * *". The administering authority has not prescribed regulations with respect to a § 1675(a) periodic review with the exception of 19 CFR 355.37. Additionally both sections 1671f(a) and (b) refer to a countervailing duty order issued under 19 U.S.C. 1671e, whereas the increase involved herein, which is the result of a periodic review, is not such an order but rather a final determination made under § 1675a. Had Congress intended to include § 1675 periodic review matters in § 1671f, it might well have set forth section 1675 in said provision.[2] The conditions required are not met in a situation where the imported merchandise is from a nonsignatory country and the increase in duties is a result of a periodic review.

Accordingly, the Court finds the suspension of liquidation of entries covering nonrubber footwear from India invalid since there is no authority given by law or regulation which would permit such action. It is apparent that Congress intended the revised findings of a periodic review to be effective as of the date of publication of such finding as to entries made or withdrawn from warehouse after said date.[3]

In view of the foregoing plaintiff's motion for summary judgment is granted and cross-motion of defendant and intervenor is denied. The District Director shall liquidate or reliquidate the entries in a manner consistent with this decision.

Judgment will be entered accordingly.

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576 F. Supp. 646

GREENHALGH MILLS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–6–00806

Before, LANDIS, *Judge.*

Water Jet Looms Manufactured in Czechoslovakia

[Plaintiff's motion on a submitted agreed statement of facts in lieu of trial is granted.]

(Decided December 2, 1983)

Siegel, Mandell & Davidson (*Allan H. Kamnitz* and *Michelle S. Benjamin* on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Michael P. Maxwell* on the brief) for the defendant.

LANDIS, *Judge:* This case involves the importation of certain merchandise and accessories into the United States from England after the same had been used for approximately eleven (11) years in England and then resold to a non-related person after first having been manufactured in Czechoslovakia.

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[2] Section 1671(f) specifically enumerates sections 19 U.S.C. 1671b(d)(2), 19 U.S.C. 1671e, 19 U.S.C. 1671d(b), 19 U.S.C. 1671e(a)(3) and 19 U.S.C. 1677g.

[3] It is interesting to note that Press Release 116 of the United States Senate Committee on Finance, dated May 8, 1979, at page 5, while not part of the legislative history, is supportive of this position.

In this action plaintiff challenges the classification and valuation of merchandise and accessories of 306 Elitex Water Jet Looms and Accessories, imported at the Port of Boston during June and July of 1981.

The parties submit this action upon an agreed statement of facts in lieu of trial. Additionally, it has been indicated that the imported merchandise would have been valued at the appraised value less $29,350, which represents transaction value. (Section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, P.L. 96-39). This stipulation effectively removes the valuation question as issue for court decision.

The stipulation indicates the merchandise was manufactured in Czechoslovakia and further indicates that it was exported to England in 1968 and 1969 when purchased by Samuel Courtauld & Co. Ltd. (Courtauld). The looms, together with accessories of English origin, were installed in Courtauld's mill in Baintree (Essex), England, during 1968 and 1969 and were in continuous use at the Baintree site from the time of their installation until 1980 when the Baintree mill ceased operation. Also, Courtauld had no intention of reselling or exporting the merchandise to the United States when purchased in 1968 and 1969. In 1981, after the Baintree mill ceased production, the looms were sold to plaintiff, who is unrelated to the seller.

Customs classified the merchandise as weaving machines under TSUS item 670.14, assessing duty pursuant to the Column 2 rate of 40% ad valorem. Plaintiff contends the duty should be assessed at 6.4% ad valorem pursuant to the Column 1 rate of duty under TSUS item 670.14.

The pertinent provisions of TSUS relative to the respective classification made by Customs and claimed by plaintiff and the duty assessments thereunder are as follows:

General Headnote 3:

> (f) *Products of Communist Countries*. Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion Act of 1962, or to action taken by the President thereunder:
>
> * * * * * * *
>
> Czechoslovakia
>
> * * * * * * *
>
> (g) *Products of All Other Countries*. Products of all countries not previously mentioned in this headnote imported into the

> Customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the Schedules.

Schedule 6, Part 4, Subpart E

> Weaving machines, knitting machines and textile machines for making lace, net, braid, embroidery trimmings, fabrics, or other textile articles:

	Rates of Duty	
	1	2
670.14 Weaving machines.	6.4% ad val	40% ad val.

Plaintiff basically argues that Courtauld, the entity from whom it purchased the merchandise, had no intention in 1968–69 of reselling or exporting the merchandise to this country in 1980 and, that the continuous use of the merchandise for over a decade caused it to become a *bona fide* part of English commerce losing all connection with Czechoslovakia and thereby being neither a direct nor indirect import from a communist country.

Defendant argues that General Headnote 3(f), TSUS applies to products of communist countries imported directly or indirectly into the United States, and that in the present case, it is clear that the imported merchandise originated in Czechoslovakia and was "indirectly" imported into the United States in the same condition as manufactured, albeit after long and continuous use in England. Defendant further contends that the use in the intermediate country, England, has not changed the merchandise or its purpose as it is imported into the United States in the same condition as exported from Czechoslovakia, accordingly, they are indirect imports from that country.

After reviewing all the evidence of record, including the stipulation entered by the parties, I find that plaintiff has sustained its burden of showing that the imported merchandise had become a *bone fide* part of English commerce thereby severing all contact with the original manufacturing communist country.

The difference between a direct importation and an indirect importation was initially explained by the Customs Court of Patent and Appeals in *United States* v. *Hercules Antiques,* 44 CCPA 209, C.A.D. 662, (1957). The court per Judge Worley, in an opinion concurred in by Judge Rich, stated:

> * * * It is reasonable to assume, therefore, that the words "imported indirectly" in the proclamation were intended to include merchandise which had been separated from the country in which it originated by something more than mere passage through or transshipment in an intermediate country.

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Defendant attempts to interpret the CCPA language to mean that an importation that is not direct must be indirect and therefore still subject to General Headnote 3(f). If defendant's reasoning is followed to its logical conclusion then any product manufactured in a communist country could never lose its identity with the communist country no matter the duration of stay or nature of transaction that product was subject to in the intermediate country. This clearly is not a proper interpretation of the *Hercules* decision. Indeed, Judge Worley, in discussing earlier cases of the Customs Court, went on to say:

> It would be difficult, if not impossible, to define exact standards for determining the duration of stay of merchandise in an intermediate country, the nature of the transactions to which it is subjected there, and other circumstances necessary to divest it of its status as an import, direct or indirect, from the Communist-dominated country in which it originated. However, we are of the opinion it must be established by appropriate evidence that the merchandise has actually become a *bona fide* part of the commerce of the intermediate country. That responsibility which, of course, rests upon the importer has not been satisfactorily discharged here.

Furthermore, Chief Judge Johnson in the opening paragraph of his dissenting opinion in *Hercules,* id. recognized the fact that a product produced in a communist oriented state may lose its identity with that state when the product has become a part of commerce of an intermediate country prior to importation into the United States. Chief Judge Johnson stated:

> I agree with the unanimous decision of the Customs Court that the importer has overcome the presumption of correctness attaching to the collector's classification, and that "at the time the glassware in question was exported from Holland, it had become part of the commerce of that country and had lost any connection that it had formerly had with Bohemia or Czechoslovakia, or any other nation in which it had been manufactured."

Hercules, id., at 216

It is obvious from this language that while the court could not define exact standards to determine when an import divests itself of its status of being from a communist country, it did contemplate that it is possible to prove divestiture.

The facts in this action clearly show divestiture. The merchandise was installed in a mill located in England where it was in constant operation for a period of twelve (12) years before the mill closed and the merchandise exported to the United States. It would defy logic to say that the merchandise did not become a *bona fide* part of English commerce or to think that Czechoslovakia contemplated it would be sold to the United States twelve years later, whereupon the stipulation specifically states that Courtauld (the purchaser) had no intention of reselling or exporting the looms to the United States when they were purchased in 1968 and 1969. The stipulation aslo states that the merchandise was installed with accessories of English origin. Further, over a twelve year period maintenance including major part replacement surely must have taken place.[1]

Defendant's reliance upon *United States* v. *Dessy Enterprises, Inc.*, 47 CCPA 16, C.A.D. 722 (1959) for the conclusion that duration of merchandise in an intermediate country alone is not sufficient to transform merchandise from Column 2 rates to Column 1 rates is not well taken. *Dessy* involved the importation of certain glassware, wall plates, decorated china plates, etc. and contained the appraisers notation on the invoices of being of either "East German or Czecho origin unless otherwise noted * * *." The Customs Court sustained the importer's protest on the ground the importer had proved the collector wrong. The CCPA reversed stating the proof offered by the importer fell far short of satisfying its dual burden. Apparently some of the merchandise in *Dessy* was manufactured long before Czechoslovakia came under communist influence. In reviewing the opinion of the Customs Court, the CCPA stated:

> We take the above to mean that the statute and proclamation might be so construed as to require a distinction between those goods manufacutured *prior* to Communist domination and those manufactured *after* such domination. However, as we tried to point out in *Hercules*, [2] the obvious purpose of the statute is to deny to Communist-dominated countries the benefit of reduced duties: therefore, it would seem immaterial at what time the goods were produced. Indeed, it appears that a different conclusion would lead to a granting of reduced duty on so-called "old" articles of commerce exported from Iron Curtain countries and denial of such reduction to so-called "new" articles.

Dessy, 20 (Emphasis in original).

The *Dessy* case does not refer to a time duration of how long the goods were in an intermediate country. The decision merely holds that there is no difference under the intent and application of the statute as to the time when the article was manufactured, whether it be pre- or post-communist domination. According to the CCPA "the obvious purpose of the statute is to deny communist-dominated countries the benefit of reduced duties.

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[1] A stipulation of facts adopted by a trial court is, perhaps the strongest factual finding that can be made. There is no necessity to evaluate the credibility of witnesses nor to evaluate the impeachment value of crossexamination. The particular facts are agreed to and admitted by the parties. The Court of Customs and Patent Appeals (now the United States Court of Appeals for the Federal Circuit) has historically maintained that the review of factual determinations of the Customs Court is limited to inquiry as to whether the finding is based upon substantial evidence in support thereof or whether it is clearly contrary to the weight of evidence. *Pistorino & Co.* v. *United States*, 67 CCPA 1, C.A.D. 1234. 607 F. 2d 989 (1979); *C. Itoh & Co.* v. *United States*, 69 CCPA 147, 678 F.2d 218 (1982); generally, 28 USC § 2601(c) (as amended by the Customs Courts Act of 1980, Pub. L. 96-417, Title IV, § 403(d), Title V, § 501(28) (Oct. 10, 1980). Substantial evidence is particularly borne out by the stipulation in the present action.

This basic intent is directly on point in the instant action. By 1980, Czechoslovakia could not reasonably be held as receiving a benefit because of a benefit bestowed by a reduced duty which later happened to exist between an English and an American company. This transaction was purely a commercial one between entities from England and the United States. All ties between Czechoslovakia and the underlying merchandise had been long severed by reason of its sale and usage by an English enterprise located in England. The merchandise was not kept in a warehouse or other storage facility to resell at a later date. Rather, it was *immediately installed and used continuously on a regular basis by the English purchaser* for more than ten years, thus, becoming a *bona fide* part of commerce of that country

Accordingly, judgment shall enter for plaintiff.

Let judgment enter accordingly.

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578 F. Supp. 418

UNITED STATES STEEL CORPORATION, REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS, AND COMPANHIA SIDERURGICA PAULISTA, ET AL., INTERVENORS

Court No. 82-10-01361

UNITED STATES STEEL CORPORATION, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS, AND COMPANHIA SIDERURGICA PAULISTA, ET AL., INTERVENORS

Court No. 82-10-01361S

BETHLEHEM STEEL CORPORATION, ET AL., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT

Court No. 82-10-01369

Before WATSON, *Judge.*

Memorandum Opinion and Order on Defendant's Motion for Protective Order

[Motion Granted in Part.]

(Decided December 7, 1983)

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Francis J. Sailer,* Attorney, Commercial Litigation Branch) for the United States.

Law Department of United States Steel Corporation (D. B. King, J. J. Mangan, C. D. Mallick, L. Ranney and *P. J. Koenig,* of counsel) for plaintiff United States Steel Corporation.

Cravath, Swaine & Moore (Joseph R. Sahid and *Steven Schulman,* of counsel) for plaintiffs Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

Watson, *Judge:* The defendant has moved pursuant to Rule 26(c) of the Rules of this Court for an order protecting approximately 284 documents [1] from discovery or disclosure on the grounds that they contain privileged, deliberative information. The material in question is part of the administrative record of a Department of Commerce countervailing duty investigation which is under judicial review in these actions.

The defendant's motion is supported by the affidavit of Lionel H. Olmer, Under Secretary for International Trade, in which he asserts that all of the material contains agency communications reflecting the deliberative and decision-making process. The Court, after review of the documents *in camera,* has decided that approximately 15 percent of the material is not entitled to a protective order because it either is not privileged against disclosure, or the need of plaintiffs outweighs the importance of the privilege. A few documents have not been located in the record and, as to them, the motion will be decided when they are found. The remaining documents are held to be privileged. In making this determination the Court has carefully examined the material in dispute and has applied established standards of case law.

The underpinning of the executive-deliberative privilege is the protection of governmental communications containing advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions are formulated. *SCM Corp.* v. *United States,* 82 Cust. Ct. 351; C.R.D. 79-11; 473 F. Supp. 791 (1979), *Carl Zeiss Stifting* v. *V.E.B. Carl Zeiss Jena,* 40 F.R.D. 318 (D.D.C. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir. 1967) *cert. denied,* 389 U.S. 952.

The purpose behind the privilege is the encouragement of free and frank discussion within the government regarding the formulation of policy as well as the insulation of the mental processes of executive or administrative officers from judicial review. *E.P.A.* v. *Mink,* 410 U.S. 73 (1973); *Sprague Elec. Co.* v. *United States,* 81 Cust. Ct. 168, 462 F. Supp. 966 (1978). Communications entitled to the protection of this privilege must be deliberative. "Predecisional materials are not exempt merely because they are predecisional; they must also be a part of the agency give and take—of the deliberative process—by which the decision itself is made." *Vaughn* v. *Rosen,* 523 F.2d 1136, 1144 (D.C. Cir. 1975).[2]

Post-decisional communications containing or explaining final agency policy and decisions are not considered deliberative and thus are not protected from disclosure. *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 151-2 (1974). "To prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies before it." *Sterling Drug Inc.* v. F.T.C., 450 F.2d 698 at 708 (D.C. Cir. 1971).

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[1] The term "document" is used in a broad sense in this decision and includes tape recordings.

[2] Although the cited decision involved the Freedom of Information Act, 5 U.S.C. § 552(b)(5), decisions ordering disclosure under that Act are pertinent in delineating information which is unqualified for the deliberative privilege. 2 *J. Weinstein & M. Berger, Weinstein's Evidence* ¶509-41 (1981) *see also E.P.A.* v. *Mink,* 410 U.S 73, 85-86, *McClelland* v. *Andrus,* 606 F.2d, 1278 n. 54 (D.C. Cir. 1979).

Material comprised of purely factual or objective material not part of the deliberative process or, where the factual material contained within the deliberative memoranda is severable are also outside the scope of the privilege. *E.P.A* v. *Mink, supra,* at 87–88. Those documents that may be deemed deliberative when originated, but were expressly adopted or incorporated by reference in a final agency decision, are also not entitled to any deliberative privilege. *NLRB* v. *Sears, Roebuck & Co., supra,* at 161.

After all these considerations are taken into account, from the vantage point of the final agency decision, that material which still possesses the uncrystallized and indecisive nature of deliberations is entitled to a *qualified* privilege. At that point the Court must balance the competing interests of the parties involved, by weighing the importance of preserving confidentiality against the adversary's need for disclosure of the information. *Sprague Elec. Co.* v. *United States, supra.*

This Court, after careful review, finds that the documents listed by page number in the Appendix, attached to and made a part of this order, are not entitled to a protective order. The material on that list is either not deliberative within the criteria applied by the Court, or the plaintiffs' need for it is paramount. As to those documents the motion is DENIED.

The documents numbered 101079–101101; 101110; 101124–101129; 101161–102115; 101239; and 101241–101252 have not been found in the administrative record. The defendant is ordered to locate and forward these documents to the Court. Defendants's motion will remain pending with respect to those documents until the Court has an opportunity to review them.

With respect to the remaining documents, defendant's motion for a protective order is GRANTED and those documents shall not be disclosed.

APPENDIX

(1) 005007–11
(2) 100149
(3) 100150
(4) 100152
(5) 100211–23
(6) 100688–701
(7) 100766–71
(8) 100883–4
(9) 101102–3
(10) 101139–54
(11) 101157–60
(12) 101135
(13) 101138
(14) 101155
(15) 101249–51
(16) 101253
(17) 101256–7
(18) 101264–71
(19) 101289–90
(20) 101302–20

Appendix—Continued

(21) 101326
(22) 101413-31
(23) 101436-49
(24) 101472
(25) 101568
(26) 101569
(27) 101623-26
(28) 101627-38
(29) 101639-41
(30) 101717-20
(31) 101723
(32) 101753-57
(33) 101758
(34) 101760
(35) 101797-817
(36) 101876-78
(37) 101887-905
(38) 101906
(39) 102037-50
(40) 102064-111
(41) 102113
(42) 102214-15
(43) 102233
(44) 102320-24
(45) 102331-39
(46) 102355-61
(47) 102635

Paul Hedgpeth, plaintiff *v.* Raymond J. Donovan, Secretary of Labor, United States Department of Labor, defendant

Court No. 81-2-00232

Before Re, *Chief Judge.*

On the Court's Motion for Review of Administrative Determination Upon Agency Record

[Administrative determination of the Secretary of Labor denying certification of eligibility for worker adjustment assistance benefits affirmed; action dismissed.]

(Decided December 7, 1983)

Paul Hedgpeth, pro se.
J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; (*Sheila N. Ziff*) for defendant.

Re, *Chief Judge:* Plaintiff, on behalf of the former employees of Bitner Lincoln Mercury, El Cajon, California (Bitner), challenges the Secretary of Labor's denial of certification of eligibility for worker adjustment assistance under the Trade Act of 1974. 19 U.S.C. §§ 2101-2487 (1976 and Supp. V. 1980). In substance, the Secretary found that plaintiff and his fellow employees were service workers employed by a firm that did not produce an article adversely impacted by increased imports within the meaning of section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3)(1976).

Plaintiff and two other workers at Bitner filed a petition, dated October 8, 1980, with the Department of Labor's Office of Trade

Adjustment Assistance (OTAA) seeking certification for worker adjustment assistance benefits. OTAA returned the petition stating that service workers generally are ineligible for adjustment assistance. Nevertheless, certification would be available to service workers if they are employed by a firm producing and import-impacted article or by a firm owned by such firm, and they provide services necessary for the production of the import-impacted article. Plaintiff's petition failed to satisfy those conditions. Therefore, the Secretary denied certification and returned the petition.

Plaintiff then sought reconsideration of the Secretary's determination alleging that the sale and servicing of new cars by automobile dealerships is an integral part of the automobile production process. The Secretary rejected plaintiff's contention stating that an independently owned and operated franchised automobile dealership, such as Bitner, did not satisfy the requirements of section 222(3) of the 1974 Act in that Bitner did not produce an article adversely affected by increased imports. On that basis, and finding no new grounds for reconsideration, the Secretary again denied certification.

Subsequently, on November 20, 1980, plaintiff instituted this action seeking judicial review of the Secretary's final determination under section 284(a) of the Trade Act of 1974, 19 U.S.C. § 2395(a) (Supp. V 1980). The gravamen of plaintiff's action is that sales and service workers at local automobile dealerships are as necessary to the production process for new Lincoln-Mercury cars as Ford Motor Company's factory level employees. Plaintiff submits that both perform work essential to the final delivery of the import-impacted automobiles to the general public. Therefore, plaintiff contends that the Secretary incorrectly interpreted the term "produced", as used in section 222(3), to apply only to those factory level workers who manufacture and assemble the import-impacted article.

After reviewing the administrative record, the court ordered defendant to show cause why an order should not be entered herein, pursuant to section 284(b) of the Trade Act of 1974, 19 U.S.C. § 2395(b), 28 U.S.C. § 1585 and § 2643(c)(1), remanding this action to the Secretary for reconsideration in light of this court's decision in *Woodrum* v. *Donovan,* 4 CIT 46, 544 F. Supp. 202 (1982), *reh'g denied,* 4 CIT 130 (1982). In *Woodrum,* this court held that the provisions of section 221(a) of the 1974 Act required the Secretary to publish notice of receipt of a properly filed petition and to investigate the petition.

Based on *Woodrum,* defendant consented to the entry of an order remanding this action to the Secretary for further proceedings. The action was remanded to the Secretary of Labor on October 5, 1982.

In compliance with the court's order, the Secretary published the required notice, 47 Fed. Reg. 44636 (1982), conducted an investigation, and on December 27, 1982, submitted a redetermination and supplemental administrative record.

The Secretary's investigation disclosed that plaintiff was engaged in the preparation and servicing of new automobiles prior to their retail sale, that plaintiff performed warranty service on those cars after their retail sale, and that these activities were standard operating practice for automobile dealerships. The investigation further disclosed that plaintiff's employing firm, Bitner, was an independently owned and operated automobile dealership and that neither the Ford Motor Company nor any of its divisions owned or exercised any control over the dealership. On that basis, the Secretary concluded that plaintiff was a service worker employed by a firm that did not produce an article within the meaning of section 222(3), 47 Fed. Reg. 49116 (1982), and thus denied plaintiff's petition for certification of eligibility for benefits.

The ownership of Bitner Lincoln Mercury and the nature of the work performed there by plaintiff and his co-workers are not in dispute. The question presented, therefore, is whether, in finding that plaintiff was not eligible for benefits because his employing firm did not produce an article adversely affected by increased imports, the Secretary correctly interpreted and applied section 222(3). Upon reviewing the original and supplemental administrative records, it is the determination of the court that the Secretary's denial of certification is supported by substantial evidence and in accordance with law.

The Secretary is required to certify a petitioning group of workers as eligible for trade adjustment assistance benefits if he determines:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles *produced* by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production. [Emphasis added.]

* * * * * * *

Trade Act of 1974, § 222, 19 U.S.C. § 2272 (1976).

This court recently held that the Secretary properly construed section 222(3) to exclude from its coverage workers at service firms, such as independently owned and operated automobile dealerships. *Woodrum* v. *Donovan*, 5 CIT 191, 564 F. Supp. 826 (1983), appeal docketed, No. 84-651 (Fed. Cir. Dec. 1, 1983); *Miller* v. *Donovan*, 6 CIT 67, 568 F. Supp. 760 (1983).

In *Woodrum,* plaintiffs on behalf of former automobile dealer sales and service employees, challenged a determination by the Secretary of Labor denying them certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974. In substance, the Secretary found that plaintiffs, as employees of independently owned automobile dealerships, were service workers employed by a firm that did not produce an article adversely affected by increased imports within the meaning of section 222(3). Plaintiffs claimed that, regardless of the nature of their work, the court should consider them as part of the production process because their labor was essential to the delivery of the end product, a new Chrysler automobile. Plaintiffs further claimed that they actually performed installation and assembly procedures which were a necessary part of the production process.

This court, relying on *Pemberton* v. *Marshall,* 639 F.2d 798(D.C. Cir. 1981), rejected plaintiffs' contentions and stated that "production under section 222(3) requires the manufacture or creation of something tangible. The *Pemberton* test is whether the workers in question transformed articles into new and different articles." *Woodrum,* 564 F. Supp. at 831. Finding that the *Woodrum* plaintiffs failed to meet the *Pemberton* test, this court affirmed the Secretary's denial of certification of eligibility for benefits under the worker adjustment assistance program.

A careful review of the administrative record in the present case discloses that:

—Bitner is a franchise dealer operating independently of Ford Motor Company or any of its divisions;

—plaintiff services new Lincoln-Mercury cars both before and after retail sale; and

—much of this servicing includes warranty work performed on behalf of Ford Motor Company, which reimburses Bitner for that work.

It is plaintiff's principal contention that the warranty work constitutes a continuation of the assembly process and satisfies the "production" requirement of section 222(3).

There is no question that the facts in this case are similar in all-respects with those in *Woodrum* and *Miller.* Although plaintiff worked on tangible articles, by his own admission, that work consisted of "servicing," *e.g.,* warranty work for new Lincoln-Mercury cars. It is evident that under the *Pemberton* test, plaintiff's labors did not result in the creation or transformation of those cars into a new end product. The record does not support plaintiff's contention that the performance of warranty work is a continuation of the assembly or manufacturing process and thus constitutes "production" under section 222(3). In view of the similarity of facts and the legal issues presented, it cannot be questioned that under the doctrine of *stare decisis, Woodrum* and *Miller* are controlling.

It is the holding of this court that the Secretary of Labor's denial of certification is supported by substantial evidence and in accordance with law. Accordingly, the Secretary's determination is affirmed, and plaintiff's action is dismissed.

PAGODA TRADING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01682

Before WATSON, *Judge*.

Memorandum Opinion and Order on Motions for Expedited Hearing

[Motion Granted in Part.]

(Decided December 8, 1983)

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office (*John J. Mahon*, Department of Justice) for defendant.

Rode & Qualey (*Michael S. O'Rourke*, of counsel) for plaintiff.

WATSON, *Judge*: Plaintiff started this action for declaratory judgment under 28 U.S.C. § 1581(h)[1] on November 23, 1983. Two days later it filed a motion for declaratory judgment and requested a hearing on December 7, 1983. On November 28th the government moved to strike the motions for declaratory judgment and expedited hearing. On November 29, 1983, the Footwear Group of the American Association of Exporters and Importers (the Footwear Group) filed a motion for leave to appear as *amicus curiae*. On December 2, plaintiff filed an opposition to defendant's motion to strike, moved to have the expedited hearing held on or before December 16th, and further moved to compel defendant to answer the complaint on or before December 14, 1983. On December 7th, plaintiff supplemented its motion for an expedited hearing with an affidavit from one of plaintiff's principals.

The most important point is that plaintiff is alleging irreparable injury from a ruling which affects footwear it wants to import into the United States. It further alleges the necessity of a speedy hearing. It has supported these allegations with a detailed affidavit from one of its principals. In this matter, the first step is to determine the necessity for an expedited hearing. On this question the government will be allowed until December 14, to raise any substantive objections it may have to jurisdiction or to expedited hearing of the merits and the Court will hold a hearing on jurisdiction and the need for expedited treatment on that date. If, after that hearing, the Court finds that an expedited hearing on the merits is required, it will accelerate the time to answer and arrange for such further briefing or hearing as may be necessary.

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[1] Subsection (h) of section 1581 provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, draw-backs, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

It should be noted that Subsection (h) must be read in conjunction with 28 U.S.C. § 2643(4) which reads as follows:

In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

For the moment, defendant's motion to strike is DENIED without prejudice. Plaintiff's motion for a hearing on or before December 16, 1983, is GRANTED to the extent that a hearing on the need for expedited disposition of the action and possible jurisdictional objections will be held on December 14, 1983.

Plaintiff's motion to compel an answer on or before December 14, 1983, is DENIED.

Roquette Freres and Roquette Corporation, plaintiffs v. United States, defendant, Pfizer Inc., intervenor

Court No. 82-5-00636

Before Boe, *Judge*.

Order

(Dated December 9, 1983)

Wald, Harkrader & Ross (*Joel E. Hoffman* and *Marilyn E. Kerst*, of counsel) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General (*David M. Cohen*, Director Commercial Litigation Branch and *A. David Lafer*) for the defendant.

Barnes, Richardson & Colburn (*E. Thomas Honey*, *Michael A. Johnson*, of counsel) for the intervenor.

Rivkin, Sherman & Levy (*Saul L. Sherman*, *Thomas A. Greene*, and *Lance E. Tunick*) attorneys for ICI Americas Inc., *amicus curiae*.

Plaintiffs Roquette Freres and Roquette Corporation and intervenor Pfizer Inc. move for access to all confidential documents filed by the International Trade Commission (ITC) with this court on November 23, 1983 as a part of administrative record in *Sorbitol from France*, USITC Investigation No. 731-TA-44 (Final—Court Remand).

In its prior memorandum and order under date of December 13, 1982, this court set forth the standards by which competing interests should be balanced in determining the access of parties to the confidential documents submitted during the course of administrative proceedings. This court, after reviewing its prior order under date of December 13, 1982 and after considering the determination of the ITC or remand, concludes that the provisions of that order should not be modified or altered as they relate to the confidential documents referred to therein.

With respect to the confidential documents filed with this court by the ITC as a part of the administrative record in connection with its determination in said proceedings on remand, the court has endeavored to continue to balance the needs of the parties seeking the confidential information against the pubic interest in protecting confidential business data. In so doing, the court adheres to the determination made in its prior order, namely, "The industry-wide aggregate data, and not the individual producer statistics, form the basis of the administrative determinations and therefore are material to the plaintiffs' challenge to the finding of dumping against plaintiffs and the finding of *material injury* to *'an industry in the United States'* " (emphasis added).

Accordingly, the court is satisfied that aggregate tables and weighted averages with respect to domestic production of all forms of sorbitol contained in the statistical tables utilized by the ITC should be made available as material information. Statistical data of the individual domestic producers of sorbitol are neither relevant nor material to the administrative determination as made by the ITC.

Now therefore, upon reading and filing the motions of the plaintiffs and intervenor for access to all confidential documents, the responses of the plaintiffs, defendant, and amicus curiae thereto, it is hereby ORDERED

A. Plaintiffs' and intervenor's motions for access to confidential information and documents contained in the administrative record on remand transmitted to the court by International Trade Commission are granted to the following extent and denied in all other respects:

1. Within 10 days from the date of entry of this order, the clerk of this court shall make available to plaintiffs' and intervenor's outside counsel, at the offices of the clerk, for purposes of examining and copying the following confidential documents enumerated in List Number 2, "Confidential Documents Transmitted to the Court of International Trade," subject to the exceptions, terms and conditions specified below:

a. Documents 1–5, 7–14, and 16 shall be made available in full to plaintiffs and intervenor.

b. Documents 6, 15 and 18 shall be made available. However, in the statistical tables referred to on the following pages, the names of the respective domestic producers and the data relating specifically to each shall be deleted. Only the aggregate totals and weighted averages of the domestic production of all forms of sorbitol contained in such statistical tables shall be made available:

(1) Document 6: pages A–18, table 2; A–20, table 3; A–22, table 4; A–23, table 4; A–25, table 5; A–30, table 8; A–32, table 9; A–33, table 10; A–34, table 11; A–35, table 12; A–36, table 13; A–42, table 16; A–45, table 18;

(2) Document 15: pages A–18, table 2; A–19, table 2; A–21, table 3; A–23, table 4; A–24, table 4; A–25, table 4; A–26, table 4; A–28, table 5; A–30, table 6; A–31, table 6; A–34, table 8; A–

35, table 8; A-36, table 9; A-37, table 9; A-43, table 10; A-45, table 11; A-47, table 12; A-49, table 13; A-54, table 16; A-57, table 18;

(3) Document 18: pages A-18, table 2; A-19, table 2; A-21, table 3; A-23, table 4; A-24, table 4; A-25, table 4; A-27, table 5; A-29, table 6; A-30, table 6; A-33, table 8; A-34, table 8; A-35, table 9; A-36, table 9; A-42, table 10; A-44, table 11; A-46, table 12; A-48, table 13; A-53, table 16; A-56, table 18;

c. Document 17:

(1) Subparts 17.02, 17.04, "B" and "C" shall be made available in full.

(2) Subparts 17.01 and the questionnaire component of 17.03 shall be protected from disclosure to plaintiffs and intervenor. The "10-K" Report component of subpart 17.03 shall be made available in full.

(3) Subpart "A"

(a) worksheets re: imports questionnaires consisting of 20 11-inch long pages, the first of which is entitled "1978: Imports from France," shall be made available in full.

(b) worksheets re: producers' questionnaires consisting of nine 14-inch long sheets entitled "Shipments" shall be made available. However, in the statistical tables referred to on the following pages, the names of the respective domestic producers and the date relating specifically to each shall be deleted (including the figures included in footnote 1 to the "capacity" table on page 6). Only the aggregate totals of the domestic production for each year of all forms of sorbitol contained in such statistical tables shall be made available.

B. Except as otherwise provided in this order, counsel for plaintiffs and intervenor shall not disclose the confidential information to anyone other than their immediate office personnel actively assisting in this litigation.

C. Counsel for plaintiffs and intervenor and their immediate office personnel shall neither disclose nor use any of the confidential information for purposes other than this litigation or any remand or appeal of this matter.

D. If, in the opinion of plaintiffs' and/or intervenor's counsel, it becomes necessary to consult with experts in evaluating the confidential information, counsel will not contact such experts without first notifying, and conferring with, counsel for defendant regarding the suitability of such experts. If the respective parties cannot agree upon a suitable expert within ten (10) days of notification to defendant's counsel, plaintiffs' or intervenor's counsel may submit the matter to the court for resolution.

E. In on event shall disclosure of confidential information be made to in-house counsel or other representatives, agents or employees of the plaintiffs and of the intervenor, or of their constituent members.

F. Counsel for plaintiffs and intervenor shall maintain a record of any and all copies of confidential information made, the names of the persons to whom such copies were provided and the dates of their return. All such copies shall be clearly marked as containing confidential information and all persons receiving copies shall be directed to return them at the conclusion of this litigation.

G. Any documents, including briefs and memoranda, containing any of the confidential information in this order, which are filed with the court in this case or used for any other purposes, shall be conspicuously marked as follows: " 'Confidential'—Subject to Protective Order. This contains material filed by (*name of party*) for the purpose of this litigation only. It is not to be opened other than by the Court, nor are the contents hereof to be displayed or revealed other than to the Court, except by Court Order or by agreement of the parties." Arrangements shall be made with the clerk of this court to retain such documents under seal, permitting access only to the court, court personnel authorized by the court to have access, and counsel for the parties. Copies of all the foregoing documents, but with the confidential information deleted, shall be filed with the court at the same time that the documents containing the confidential information are filed and shall be conspicuously marked as non-confidential copies.

H. Any briefs or memoranda containing confidential information shall be served on the other parties in a wrapper conspicuously marked on the front "Confidential—to be opened only by attorney of parties in '*Roquette Freres and Roquette Corporation* v. *United States and Pfizer, Inc.*,' " and shall be accompanied by a separate copy from which the confidential information has been deleted.

I. At the conclusion of this litigation and any appeal or remand of this matter, counsel for plaintiffs and intervenor shall return to the clerk of this court all copies of the confidential documents obtained under this order and the record required to be maintained under subparagraph F hereof.

J. Any reference to plaintiffs' or intervenor's counsel herein shall include counsel for any other interested party that may subsequently be granted access to such documents under protective order.

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577 F. Supp. 22

PAGODA TRADING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01682

Before WATSON, *Judge.*

Memorandum Opinion and Order on Motion To Dismiss

[Motion granted.]

(Decided December 15, 1983)

J. Paul McGrath, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office (*John J. Mahon*, Department of Justice) for defendant.

Rode & Qualey (*Michael S. O'Rourke* and *Patrick D. Gill*, of counsel) for plaintiff.

WATSON, *Judge:* Defendant moved to dismiss plaintiff's action for declaratory judgment on the ground of lack of jurisdiction. The motion was interposed following plaintiff's attempt to obtain expedited treatment for the action and following the Court's setting of a hearing on preliminary matters in Slip Opinion 82-129 (December 7, 1983). The short, but active, history of this action is set out in that opinion.

The Court considered all the papers filed, including plaintiff's opposition to the motion to dismiss, and oral argument was held on December 14, 1983. At the conclusion of oral argument the Court granted defendant's motion to dismiss. This opinion is issued to explain the dismissal in detail.

Defendant's first, and dispositive argument against jurisdiction, was that the administrative action challenged by plaintiff was not the "ruling" for the review of which prior to importation, 28 U.S.C. § 1581(h)[1] was designed.

The pronouncement in question, contained in T.D. 83-116 (48 Fed. Reg. 22,904) was published by the Secretary of the Treasury on May 23, 1983. It expressed guidelines for the classification of footwear. In particular, it contained a section devoted to guidelines "set forth as an aid to Customs officers in classifying specific footwear constructed with foxing." (48 Fed. Reg. 22,910)

The administrative decision complained of did not rule specifically on the merchandise which plaintiff intends to import. It is the opinion of the Court that judicial review in advance of importation was not intended for an instance when the merchandise in question and its classification still remain in an indefinite state. The expectation that a general administrative ruling will be applied in a particular case is not sufficient to create a ripe dispute in this area. The law envisions a classification dispute moved back in time prior to importation. But this is not possible if the classification decision and the identity of the affected merchandise are not fully materialized.

The defect in this action can be characterized in a number of ways—as a lack of ripeness, as a failure to exhaust administrative remedies or, most specifically, as the absence of the sort of ruling for which § 1581(h) was intended.

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[1] Subsection (h) of section 1581 provides:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of *the goods involved*, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, draw-backs, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation. [emphasis supplied]

It should be noted that Subsection (h) must be read in conjunction with 28 U.S.C. § 2643(4) which reads as follows:

> In any civil action described in section 1851(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

The cause of action under § 1581(h) was not created to allow judicial review of general interpretative rulings issued by the Secretary of the Treasury whenever there is a likelihood of an effect on importations. The Court reads the language of the law as speaking to rulings which determine the fate of specific importations of specific goods. The Court also reads the legislative history as speaking to specific contemplated import transactions which contain identifiable merchandise and which will feel the impact of the ruling with virtual certainty. H. Rep. No. 96-1235, 96th Cong., 2d Sess. 46, 47 (1980)[2]

The presence of additional issues in this action regarding whether the ruling will actually be applied and what exactly the affected articles will be, is a good indication that what plaintiff is attempting is not simply an action in which a judgment on the correctness of classification is being moved back in time.

Here the Court cannot presume that this ruling will apply to particular merchandise even though importers may, in good faith, believe that to be inevitable. The Court cannot engage in a preliminary determination that merchandise will be classified in accordance with the ruling. That remains a function of the Customs Service. The necessity for the Court to consider these possibilities demonstrates the immaturity of the dispute from a judicial standpoint.

In dealing with the substance of a classification dispute, the Court should have to reach only the correctness of the classification, whether it is hearing the case before or after importation. A challenge to an administrative decision which does not allow the Court to limit its concentration to the correctness of a decision made as to a specific set of circumstances is not a challenge to a ruling within the contemplation of § 1581(h). It challenges a less concrete administrative decision which is not ready for judicial review within the existing statutory framework.

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[2] The legislative history reads as follows:

Subsection (h) of proposed section 1581 is also a new grant of subject matter jurisdiction to the Court of International Trade. It provides that the court may review, "prior to the importation of the goods involved," a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury regarding such issues as the classification, valuation, or rate of duty of those goods. At present, judicial review of a ruling can be obtained only by completing an import transaction in accordance with the ruling and then proceeding to obtain judicial review in the usual manner, that is filing a protest, paying the duties and contesting the denial of the protest.

The Committee recognizes that in certain instances a person can be injured if he is unable to obtain judicial review of a ruling by the Secretary of the Treasury unless and until the contemplated transaction is completed, the duties are paid and a suit is commenced in the Customs Court. Thus, it may be appropriate in limited circumstances to permit judicial review prior to the completion of the transaction or payment of the duties. Many of the witnesses who testified before the Subcommittee agreed, including the Departments of Justice and the Treasury.

The time-honored rule is that the court does not possess jurisdiction to review a ruling or a refusal to issue or change a ruling by the Secretary of the Treasury unless it relates to a subject matter presently within the jurisdiction of the United States Customs Court, for example, an action brought pursuant to section 515 of the Tariff Act of 1930. The Committee intends a very narrow and limited exception to that rule. *The word "ruling" is defined to apply to a determination by the Secretary of the Treasury as to the manner in which it will treat the contemplated transaction.* In determining the scope of the definition of a "ruling," the Committee does not intend to include "advice" or a request for "further review," both of which relate to completed import transaction.

It is not the Committee's intent to permit judicial review prior to the completion of the import transaction in such a manner as to negate the traditional method of obtaining judicial review of import transactions. Many individuals will, or course, desire to obtain judicial review without the payment of duties. Such review, however, is exceptional and is authorized only when the requirements of subsection (h) are met. [emphasis supplied]

For these reasons defendant's motion to dismiss for lack of jurisdiction is GRANTED.

F. W. MYERS & CO., INC., (ON BEHALF OF GENERAL MOTORS CORPORATION), PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 83-3-00345

Before FORD, *Judge*.

On Defendant's Motion To Dismiss

[Defendant's motion to dismiss granted; plaintiff's motion to remand denied.]

(Decided December 16, 1983)

Bedros Odian at the oral argument and on the brief for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Michael P. Maxwell* at the oral argument and *Susan Handler-Menahem* on the brief) for the defendant.

FORD, *Judge*: This action involves the importation of certain automobile parts which were entered, classified, and liquidated under Item 692.32 of the Tariff Schedules of the United States and assessed with duty at 3.9 percent ad valorem as parts of motor vehicles.

Plaintiff contends the merchandise is entitled to free entry under Item 692.33 as Canadian articles within the meaning of General Headnote 3(e) and Headnote 2 of Subpart B, Part 6 of Schedule 6 and pursuant to the Automotive Products Act of 1965.

The parties are before the Court by virtue of defendant's motion, pursuant to Rule 12 of the Rules of the United States Court of International Trade, to dismiss the action for lack of jurisdiction and/or failure to state a claim upon which relief may be granted.

The chronology of the number of various letters, requests, and documents filed with the Customs Service is as follows:

Plaintiff on April 11, 1980 filed a letter with the Customs Service requesting reliquidation of the involved entry pursuant to Section 501 of the Tariff Act of 1930, and, alternatively, requested that if reliquidation under Section 501 could not be accomplished within ninety days the letter be considered a formal protest. This procedure was followed pursuant to a directive issued by the District Director of Buffalo on February 5, 1975 suggesting such procedure.

Customs, on May 29, 1980, returned a copy of the April 11 letter with a handwritten notation indicating the request for reliquidation could not be granted without additional documentation.

On February 3, 1981 plaintiff filed a formal protest on Customs Form 19, enclosing the documents requested on May 29, 1980.

The Customs Service on June 16, 1981 sent a valid notice of denial stating the basis to be untimeliness of protest.

Plaintiff on July 7, 1981 requested a review of its denied protest of April 11, 1980 under Section 520(c) of the Tariff Act of 1930.

This request was denied by Customs in a handwritten note on a copy of said letter on December 1, 1981.

A nine-page document, dated August 25, 1982, entitled "Prctest", was filed with Customs on August 26, 1982.

A document entitled "Supplemental Protest" (to the protest dated August 25, 1982) was filed with Customs on September 7, 1982.

The Assistant District Director on October 12, 1982 advised plaintiff that the "Protest" of April 11, 1980 was denied on May 29, 1980, and the protest of February 3, 1981 was denied on June 16, 1981.

Counsel for plaintiff on February 24, 1983 wrote the Customs Service requesting a reliquidation of said entry. The Assistant District Director on March 1, 1983 replied no further action was being taken by the Customs Service.

Counsel for plaintiff on March 7, 1983 filed a summons against the denial of the protest filed on August 26, 1982.

In view of the numberous documents, letters and handwritten notations which were involved in this matter at the Customs Service level, it is incumbent upon the Court to clarify the statutory requirements as well as the regulations governing protests and denials. The statutory provision, 19 U.S.C. § 1514(c), provides "Only one protest may be filed for each entry of merchandise * * *". Therefore, the only valid and timely protest was filed by plaintiff on April 11, 1980. While this was a letter protest and not one filed on Customs Form 19, it did contain the information required of a protest. It has ofttimes been said that a protest is not required to be made with technical precision as long as the objections are distinct, specific and sufficient to bring to the attention of Customs the importer's intent and the relief sought. *Mattel, Inc.* v. *United States*, 72 Cust. Ct. 257, C.D. 4547, 377 F. Supp. 955 (1974). The letters and documents filed on February 3, 1981, August 25, 1981, September 7, 1982 and February 24, 1983 are all beyond the ninety-day statute of limitations for the filing of protests set forth in 19 U.S.C. § 1514(c)(2). None of these documents, etc., can be considered an amendment of the protest. To amend a protest under 19 U.S.C. § 1514(c)(1) and 19 C.F.R. 174.14 such amendment must be filed within the ninety-day period during which a protest may be filed. The above documents do not fall within this time period.

The requirements for the denial of a protest are specifically provided for in 19 U.S.C. § 1515(a) and 19 C.F.R. 174.30. Section 1515(a) provides "Notice of the denial shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 514 of the Tariff Act of 1930." Plaintiff contends that the *dicta* in the case of *Labay International* v. *United States*, 83 Cust. Ct. 152, C.D. 4834 (1979) supports its position. The Court therein held a handwritten notation of the Customs Service constituted a denial. While the statutory provision controlling at the time of *Labay* required notice to be in the style and manner prescribed by the Secretary, it did not require notice of the right to institute a civil action. Similarly the regulations, 19 C.F.R. 174.30 (1974), did not require notice of the right to institute a civil action. The *Labay* case, therefore, is not controlling under the present law.

The only denial issued by the Customs Service which complies with the statutory provisions and Customs Regulations is the denial of June 16, 1981. Customs utilized the proper basis, i.e., untimeliness, if its denial was directed against the protest of February 3, 1981. However, said protest did not comply with 19 U.S.C. § 1514(c), as it was the second protest filed against the same entry and merchandise. Nonetheless, this denial did enumerate the entry number, date of liquidation, etc., and is accordingly a denial against the only valid protest filed, that of April 11, 1980. The basis of denial, untimeliness, is improper as to the protest of April 11, 1980. However, it constitutes the only denial which conforms with the statute and regulations and, in fact, started the running of the statute of limitations with respect to the filing of this action. A summons to be timely must be filed within the 180 days after notice of denial. 28 U.S.C. § 2636. The denial was sent on June 16, 1981, and a summons was filed on March 7, 1983. The Court, therefore, lacks jurisdiction to entertain this action.

Plaintiff's letter of July 7, 1981, requesting review of the denial to reliquidate constitutes a protest under the provisions of 19 U.S.C. § 1520(c). This section authorizes the Secretary to reliquidate an entry to correct a clerical error, mistake of fact, or other inadvertance not amounting to an error of law, notwithstanding the fact that a valid protest has not been filed. However, the statute provides the clerical error, mistake of fact, etc. must be brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction. The entry involved was liquidated on March 28, 1980. Therefore, a protest filed on July 7, 1981 is untimely.

Accordingly, defendant's motion to dismiss is granted, and plaintiff's motion to remand the matter to Customs is denied.

Judgment will be entered accordingly.

577 F. Supp. 25

STEWART-WARNER CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81-12-01740

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated December 16, 1983)

Eugene L. Stewart (Eugene L. Stewart, Terence P. Stewart and *Mark A. Casso* on the briefs) for plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Deborah E. Rand* on the brief) for defendant.

Lamb & Lerch; Richard J. Kaplan, of counsel (*Sidney H. Kuflik* on the brief) for amicus curiae Diversified Products, Inc.

MALETZ, *Senior Judge:* This action involves a rare event in this court—a challenge by an American manufacturer of a Customs Service classification of competing imported merchandise. The American manufacturer, Stewart-Warner Corp. (Stewart-Warner), brought this action pursuant to section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. IV 1980), and 28 U.S.C. § 1581(b), seeking reclassification of certain speedometers used primarily on cycle exercisers.[1] Upon entry the merchandise was classified as "other" speedometers under item 711.98 of the Tariff Schedules of the United States (TSUS). Plaintiff claims that these speedometers should be classified as bicycle speedometers under item 711.93, which would result in an increase in the rate of duty by 21.1% ad valorem.[2]

The government has classified the merchandise as other than bicycle speedometers on the premise that the merchandise is chiefly used on stationary exercise cycles, not on mobile bicycles. Therefore, the government concludes, the imported speedometers cannot be a bicycle speedometer for tariff purposes. Stewart-Warner, on

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[1] Although Stewart-Warner made no preliminary request for information as to classification or rate of duty as required by 19 U.S.C. § 1516(a) (Supp. IV 1980), this is not a jurisdictional defect. "Complaints under 516(b) [the predecessor to 19 U.S.C. § 1516(a)] may be filed without a preliminary request for information as to the classification and rate of duty if the complainant knows the same." T.D. 44,466, 58 Treas. Dec. 863, 865. There is no dispute here that Stewart-Warner did know that information. *See generally Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978). To require more of plaintiff would be a mindless formalism.

[2] The relevant provisions provide:

Schedule 7, Part 2, Subpart D:

* * * * * * *

Revolution counters, production counters, taximeters, odometers, pedometers, counters similar to the foregoing articles, speedometers and tachometers, all the foregoing not provided for in subpart C of this part; parts of the foregoing:

* * * * * * *

711.93	Bicycle speedometers and parts thereof	24.9% ad val.
711.98	Other	3.8% ad val.

the other hand, contends that the legislative history of the TSUS provision for bicycle speedometers strongly indicates that "bicycle-type" speedometers, including the imported merchandise, should be classified under item 711.93.

The court's own examination of the legislative history of the bicycle speedometer tariff provision impels it to conclude that Stewart-Warner is correct. Accordingly, for the reasons that follow, judgment shall enter for plaintiff.

But for the inexorable march of progress, it is safe to conclude that this action would never have arisen. For the speedometers which are the subject of this action had not been invented at the time the new TSUS provision for bicycle speedometers was enacted in 1965. In the early 1970's, however, in response to a growing demand for a speedometer which could be mounted on the left side of either a bicycle or an exerciser, the Japanese developed the double-gear hub drive speedometer—the subject of the present action.

The advantage of the double-gear hub drive speedometer vis-a-vis its single-gear counterpart is its capacity to give a clockwise speed indicator readout when mounted on the left side of the wheel. The single-gear speedometer can only give a clockwise readout when mounted on the right side of a wheel. Since, as a practical matter, the design of exercise cycles precludes mounting a speedometer on the right side of the wheel, the double-gear hub drive speedometer has been used primarily in conjunction with exercisers, though it is perfectly suited for use on bicylces. Indeed, in all respects save one, this speedometer is physically identical with a single-gear bicycle speedometer, the one difference being that the former has the additional gear which permits it to function in a clockwise manner when mounted on the left side of a wheel.

At the outset it should be noted that the government does not dispute that the merchandise is a bicycle-type speedometer, nor does the government quarrel with the fact that a double-gear hub drive speedometer is suitable for use on a bicycle. The crux of the government's argument rather is twofold. First, plaintiff cannot prevail, the government maintains, since double-gear hub drive speedometers are not chiefly used as bicycle speedometers. Alternatively, the government submits that item 711.93 is an *eo nomine* tariff provision, that the merchandise does not possess an essential resemblance to a bicycle speedometer and that, for that reason, Stewart-Warner's action must likewise fail. While a reading of item 711.93 *in vacuo* might arguably provide some succor to the government, when that provision is exposed to the light of its legislative history it becomes unquestionable that the imported merchandise is properly classified as a bicycle speedometer under item 711.93.

The Tariff Act of 1930 as originally enacted made no specific provision for bicycle speedometers. This situation continued even after the TSUS became law in 1963. Within weeks after enactment of the TSUS several errors and omissions in the new schedules were pointed out to Congress, including the absence of a provision for bicycle speedometers. In December, 1963 the House Ways and Means Committee invited interested parties to submit proposed changes in order to eliminate anomalies in the TSUS. The upshot was the Tariff Schedules Technical Amendments Act of 1965, Pub. L. No. 89-241, 79 Stat. 933. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. (1965); S. Rep. No. 530, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 3,416.

In response to the December, 1963 congressional invitation, W. E. Faithorn, Jr., assistant secretary for Stewart-Warner, submitted a letter to the House Ways and Means Committee. The Faithorn letter pointed out the overwhelming need for a specific bicycle-type speedometer tariff provision in order to plug a purported loophole in the TSUS that allowed importers to bring in bicycle-type speedometers, putatively for use on motor scooters and motor bikes, at a substantially lower rate of duty.[3]

Prompted by this letter, Congress enacted section 36(k) of the Tariff Schedules Technical Amendments Act, 79 Stat. 941, which amended the provisions pertaining to speedometers. That amendment included a specific breakout provision for bicycle speedometers providing:

711.91[1]	Bicycle speedometers and parts thereof.	55% ad val.
711.98	Other	10% ad val.

[1] Item 711.91 was redesignated as item 711.93 by section 405(d), Title IV of the Automotive Products Trade Act of 1965, Pub. L. No. 89-283, 79 Stat. 1016, 1025.

The House Report accompanying this amendment added the following telling note:

> This new provision for bicycle speedometers would include *certain bicycle-type speedometers* which are used to a limited extent on motor scooters and motor bikes and which are currently classified under item 711.92 as being "suitable for use in highway-type motor vehicles."

H.R. Rep. No. 342, 89th Cong., 1st Sess. 26 (emphasis added). In the court's view, Congress has clearly spoken. *Cf. Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 548 F. Supp. 1261 (1982).

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[3] The 1963 TSUS provision for speedometers read in part:

Importers of bicycle speedometers, by taking advantage of this so-called loophole, realized a savings in duty equal to the difference between the item 711.92 rate and that for item 711.94.

Speedometers and tachometers, and parts thereof:

711.92	Speedometers suitable for use in highway type motor vehicles	9% ad val.
711.94	Other speedometers and tachometers	$2.25 each + 35% ad val.
711.96	Parts	45% ad val.

Importers of bicycle speedometers, by taking advantage of this so-called loophole, realized a savings in duty equal to the difference between the item 711.92 rate and that for item 711.94.

Indeed, the House Report, when read in the context of the Faithorn letter, makes it plain that it was the intent of Congress to prevent bicycle-*type* speedometers, which could readily be used on bicycles, from being imported at tariff rates lower than the rates which applied to bicycle speedometers.

To the government's and amicus' argument that the phrase "certain bicycle-type speedometers" in the House Report refers only to motor scooters and motor bike speedometers, a ready reply is provided by the Faithorn letter, a document which furnished the sole impetus for enactment of item 711.93 and, as such, is a further strong indicia of Congress' intent on this subject. *See Chicago & N.W. Ry. Co.* v. *United Transportation Union,* 402 U.S. 570, 576 (1971); *Ameliotex, Inc.* v. *United States,* 65 CCPA 22, C.A.D. 1200, 565 F.2d 674 (1977); *Best Moulding Corp.* v. *United States,* 51 CCPA 7, C.A.D. 829 (1963). From that letter it is obvious that the word "certain" refers not only to motor scooter and motor bike speedometers, but, in the words of the Faithorn letter, also to speedometers which "from the point of view of design, material, construction and overall quality, are built to the less expensive standards for a bicycle speedometer as compared to a regular motorcycle or automobile instrument." This definitively describes the subject merchandise.

Although Congress did not use the term "bicycle-type speedometers" in drafting item 711.93, a reading of the entire legislative history makes it unmistakable that this is what Congress intended to include in that item number. *See Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975); *United States* v. *Bacto-Unidisk,* 394 U.S. 784, 799–801 (1969) (A court "must take care not to narrow the coverage of a statute short of the point where Congress indicated it should extend."). And it is clear from all the evidence that the imported merchandise are bicycle-type speedometers.

Finally, as for the contentions that item 711.93 is either an *eo nomine* or use provision, while rules of construction may be employed to determine the meaning of a tariff provision, those rules are inapplicable where it is shown that the legislature intended a different result. *Esco Manufacturing Co.* v. *United States,* 63 CCPA 71, 75, C.A.D. 1167, 530 F.2d 949, 952 (1976) ("Where the intent of Congress is apparent, rules of construction [such as whether a tariff item number is a classification by use or *eo nomine* provision] may not be employed to narrow, limit, or circumscribe the statute."); *Sandoz Chemical Works, Inc.* v. *United States,* 50 CCPA 31, 35, C.A.D. 815 (1963); *S & T Imports, Inc.* v. *United States,* 78 Cust. Ct. 45, 59, C.D. 4690 (1977). It is thus unnecessary to determine whether item 711.93 is a tariff classification by use or an *eo nomine* provision, given that the classification of the imported merchandise was manifestly intended to be under item 711.93. *See also United States* v. *Durst Mfg. Co.,* 46 CCPA 74, 76, C.A.D. 700 (1959). In short, labelling item 711.93 as either a use or *eo nomine* provision would generate, not eliminate, ambiguity contrary to congressional intent.

Based on all the foregoing, the court finds that the imported merchandise are bicycle speedometers within the meaning of item 711.93 and should be so classified. Judgment for plaintiff shall enter accordingly.

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585 F. Supp. 640

FREDERICK WHOLESALE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Before CARMAN, *Judge.*

Court No. 83-1-00074

Memorandum Opinion and Order

[Defendant's motion to dismiss granted.]

(Decided December 19, 1983)

Siegel, Mandell & Davidson, P.C., (Allan H. Kamnitz and *Michelle Benjamin* on the motion) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, (*Jerry P. Wiskin* on the motion) for the defendant.

CARMAN, *Judge:* This matter is before me on defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, or alternatively, for judgment on the pleadings and/or summary judgment. Plaintiff has cross-moved for summary judgment.

Plaintiff alleges in its complaint that the January 29, 1982 notice of liquidation of Entry No. 792888 is "null and void" since said notice was not in accordance with the terms of 19 U.S.C. § 1500(e)(1982)[1] and 19 C.F.R. § 159.9(b)(1983)[2]. Plaintiff argues that absent proper notice, there has never been a final liquidation of Entry No. 792888, and that since more than 1 year has passed from date of entry without a final legal liquidation, Entry No. 792888 must be deemed to have been liquidated pursuant to 19 U.S.C. § 1504(a)(1982) "at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer * * *" Specifically, plaintiff alleges that the bulletin notice of liquidation was not posted in a conspicuous place at the New York Customhouse and that no sign was maintained at the Customhouse directing interested parties where said notice of liquidation of entries could be found.

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[1] 19 U.S.C. § 1500(e)(1982) provides:

The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—

* * * * * * *

give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

[2] 19 C.F.R. § 159.9(b) provides:

Posting of bulletin notice. The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry (or Customs station, when the entries listed were filed at a Customs station outside the limits of a port of entry), or shall be lodged at some other suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

Defendant moves to dismiss plaintiff's complaint arguing this court lacks jurisdiction because no timely protest was filed against the liquidation of Entry No. 792888. Defendant contends the notice requirements of 19 C.F.R. § 159.9(b) were satisfied, and since plaintiff failed to file a protest within 90 days after notice of liquidation as required by 19 U.S.C. § 1514(c)(2)(A)(1982),[3] it cannot pursue its case in this court.

The facts, stipulated to by the parties, in their essence follow here.

The bulletin notice at issue was first placed on an open table in Room 345 and then on an open shelf in Room 331 of the Customhouse at Six World Trade Center in New York City. Six World Trade Center is an eight-story building covering approximately one square city block. There are three means of ingress and egress to the Customhouse. The second floor (plaza level), where the cashier's office, information office, office directory and elevator to the upper floors are located, can be reached by escalators or a stairway.

During the period in question (January 29, 1982 through April 30, 1982), there was no sign maintained in the Customhouse stating the location of bulletin notices. Defendant maintains no such sign was required. The bulletin notice in question was originally placed in Room 345 of the Customhouse which is one of 36 offices on the third floor, and located adjacent to a public corridor. There was no directional sign in the third floor corridor directing the public specifically to Room 345. The bulletin notices in Room 345 were placed on a table and during the period in question, Room 345 of the Customhouse was a public room.

Although a sign existed on the door of Room 345 stating limitations on the hours of access to that room during the period January to April, 1982, the Customs Service had terminated the practice of limiting access to Room 345 to the hours stated therein. Approximately 4 weeks after the date of liquidation, *i.e.,* January 29, 1982, the bulletin notice of liquidation was moved from Room 345 to Room 331, where it was maintained on a shelf that was open, plainly visible and accessible to importers and other interested persons. There was no sign maintained anywhere in the Customhouse advising the public that the bulletin notices of liquidation were maintained in Room 331 of the Customhouse. Defendant maintains that no such sign was required. On or about January 29, 1982 through April 30, 1982, Room 331 of the Customhouse was open to the public, located adjacent to a public corridor, was the subject of a directional sign which contained the legend "Documents Control, 331," and had a sign on the door stating: "Documents Control and Certification."

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[3] 19 U.S.C. § 1514(c)(2)(A)(1982) provides in pertinent part:

A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—

notice of liquidation or reliquidation * * *

The United States Customs Service during the period January through April, 1982, maintained, on the lobby level of the New York Customhouse, a Customs Information Office. The Regional Commissioner of Customs, during the period in question, maintained an office at the New York Customhouse in Room 716 which was open to the public. The New York Seaport Area Director, during that period, maintained an office in Room 423 of the New York Customhouse also open to the public.

Plaintiff is the importer of record for Entry No. 792888 and is not a first-time importer at the New York Seaport. Plaintiff had made a considerable number of entries of merchandise at the New York Seaport prior to Entry No. 792888. Entry No. 792888 was "liquidated" on January 29, 1982 and the entry papers were so stamped. The bulletin notice of liquidation for January 29, 1982 listed the liquidation of Entry No. 792888 and was maintained in Room 345 and then in Room 331 of the Customhouse, Six World Trade Center, New York, New York 10048.

Plaintiff did not file a protest within 90 days of January 29, 1982. Plaintiff did, however, file a protest on August 26, 1982, which stated that it contested the validity of the liquidation of January 29, 1982. Entry No. 792888 was liquidated on January 29, 1982, with an increase in duties totalling $47.49. This increase in duties found to be due and owing when Entry No. 792888 was liquidated resulted from the decision of the Customs Service to classify certain bottles separately, rather than as an entirety. The only models affected were: H2/554, H2/555, H2/557, H2/558. All other merchandise in Entry No. 792888 was "liquidated" as entered by the plaintiff. The increased duties found due and owing upon the liquidation of Entry No. 792888 were paid by or on behalf of plaintiff on February 5, 1982, 7 days after the entry was "liquidated."

Plaintiff received a courtesy notice of liquidation for Entry No. 792888 prior to January 29, 1982. The courtesy notice of liquidation for Entry No. 792888 gave actual knowledge of the impending liquidation of Entry No. 792888 for January 29, 1982. Plaintiff had authorized a law firm to review the liquidation of entries and to file protests on its behalf.

The initial question to be determined is whether this court has subject matter jurisdiction to decide whether the bulletin notice of liquidation pertaining to Entry No. 792888 was given in accordance with 19 C.F.R. § 159.9(b).

Since the subject matter of this case concerns decisions which are protestable under 19 U.S.C. § 1514, plaintiff alleges jurisdiction under 28 U.S.C. § 1581(a) (Supp. V 1981).[4] The filing and denial of a timely protest is necessary for this court to exercise subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a). Generally, a timely protest is that which is accomplished within 90 days after, but not before, a notice of liquidation. 19 U.S.C. § 1514(c)(2)(A)(1982). In the case at hand, plaintiff did not file a protest within 90 days after the notice of liquidation. However, plaintiff argues that by virtue of the defendant's failure to give notice of liquidation as required by law, the liquidation of January 29, 1982 is incomplete, and a protest need not have been filed within 90 days of January 29, 1982. Plaintiff filed a protest after the 90-day period challenging the liquidation on this basis, and this protest was denied on December 27, 1982.

It is clear that this court generally is empowered to inquire whether the facts necessary to the exercise of its subject matter jurisdiction have been established. *See Schering Corp.* v. *United States,* 67 CCPA 83, 87, 626 F.2d 162, 167 (1980); *General Petroleum Corp.* v. *United States,* 56 Cust. Ct. 249, 251 (1966). (The court has the power to determine whether a protest is timely.)

The facts surrounding the bulletin notice of liquidation are relevant to the timeliness of plaintiff's protest. Absent proper notice of liquidation, the ability of a plaintiff to protest in a timely fashion is greatly impaired. Therefore, to determine whether the protest was timely, this court finds it necessary to look to the jurisdictional facts surrounding the liquidation in question to determine whether notice was given in compliance with the provisions of 19 C.F.R. § 159.9. *See Commonwealth Oil Refining Co.* v. *United States,* 67 Cust. Ct. 37, 45, 330 F. Supp. 598, 603–04 (1971), *aff'd,* 60 CCPA 162, 480 F.2d 1352 (1973).

Section 159.9(b) of Title 19 of the Code of Federal Regulations provides that the posting of the bulletin notice of liquidation shall be accomplished either by posting the bulletin notice in a conspicuous place in the Customhouse or by lodging it in some other suitable place in the Customhouse where it can be readily located by interested persons directed to that place by a notice maintained in a conspicuous place that states where notices of liquidation can be found. Plaintiff asserts that the bulletin notice of liquidation in the case at hand was neither posted in a conspicuous place nor was there a sign directing interested persons to where bulletin notices of liquidation could be found.

The bulletin notice of liquidation in question was initially placed on a table in Room 345 of the Customhouse with access to the public. The table was open and plainly visible. When the notice was later moved to Room 331 where it was maintained on a shelf, it was again open and plainly visible. Further, a Customs Information Office was maintained at the lobby level and was open to the public.

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[4] 28 U.S.C. § 1581(a) (Supp. V 1981) provides:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

With respect to the requirement of posting [5] in a conspicuous place, this court in *Commonwealth Oil* stated the following:

> [T]he bulletin notice of liquidation must be posted in a place *which is plainly visible and accessible to the ordinary interested person.* In this respect, we do not consider that it need seize the attention of the visitor with the impact and aggressiveness of a colorful advertisement, but rather *that it have a placement which is open and accessible.*

67 Cust. Ct. at 45, 330 F. Supp. at 605 (emphasis added).

In the case at hand, the bulletin notice, both when it occupied Room 345 on an open table and then in Room 331 on an open shelf, was open and accessible to importers and other interested parties. Furthermore, both Room 345 and Room 331 are located in a public corridor near the elevators and open and accessible to the public. Since the bulletin notice was in an open and accessible place, this court must find that the bulletin notice was made available to the importer in a conspicuous place and the requirements of 19 C.F.R. § 159.9(b) have been met.[6]

Therefore, notice having been properly given pursuant to 19 C.F.R. § 159.9(b), the protest was not timely made, and defendant's motion to dismiss must be, and hereby is, granted. Furthermore, plaintiff's cross-motion for summary judgment, must be, and hereby is, denied.

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577 F. Supp. 1021

HIDE-AWAY CREATIONS, LTD., PLAINTIFF *v.* UNITED STATES ET AL., DEFENDANTS

Court No. 83-5-00644

CONFECCIONES GENERALES, S.A., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 83-5-00645

Before BERNARD NEWMAN, *Judge.*

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[5] The term "posting" in 19 C.F.R. § 159.9(b) can be broadly construed and has not been interpreted to require vertical affixation. The court in *Olavarria & Co.* v. *United States*, 47 CCPA 65, 68 (1960), stated: "[A]ssuming the notices were displayed on a desk or file cabinet instead of on a bulletin board or wall, that fact alone would not necessarily establish that they were not posted in a 'conspicuous' place * * *" The operative word in the regulation is "conspicuous," and a mode of "posting" that discharges the provision's function of apprising interested persons, such as in the case at hand, is acceptable.

[6] Although a sign directing interested persons to the place where the bulletin notices of liquidation are maintained can be viewed as desirable, this court cannot find the maintenance of such a sign is required by 19 C.F.R. § 159.9(b), where the bulletin notices themselves are posted in a conspicuous place.

Leather Wearing Apparel from Mexico—Final Results of Administrative Review under Section 751

Statement in final affirmative countervailing duty determination and order covering leather wearing apparel from Mexico that "[i]n accordance with section 751 of the Act [19 U.S.C. § 1675] the Department [of Commerce] intends to conduct a review within twelve months of the publication of the countervailing duty order" *held:* insufficient to satisfy the statutory requirement of publication of notice in the Federal Register prior to conduct of administrative review under section 751. Mere statement of intent to conduct a review within twelve months of order without notice of specific date that review would be initiated was inadequate to give notice of a review commenced one year and ten days after publication of the final order. The Court finds that lack of notice prejudiced plaintiffs by ITA's exclusion of untimely filed certifications that the exporter neither received nor applied for benefits under Mexican subsidy programs. Consequently, remand to ITA for consideration of the certificates is warranted.

Since allegations of the complaints are directed against the final results of the administrative review under section 751, and not against a post-annual review refusal by ITA to consider certain certifications, as claimed by defendants, Court has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), and the complaints state a claim upon which relief can be granted. Accordingly, defendants' motion to dismiss are denied.

[Temporary injunctions extended to 20 days after final disposition by Court following remand; defendants' motions to dismiss denied; remanded to ITA for further proceedings.]

(Dated December 21, 1983)

Kemp, Smith, Duncan & Hammond, Esqs. (Luis Chavez and *John J. Scanlon, Jr., Esqs.*, of counsel) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch and *Sheila N. Ziff, Esq.,* for defendants.

BERNARD NEWMAN, *Judge:*

INTRODUCTION

These companion actions raise yet another question of first impression relating to the administration of this nation's countervailing duty law, a vital aspect of our international trade policy. Inasmuch as these two actions involve identical facts and legal issues, practicality dictates the writing of a consolidated opinion.

Confecciones Generales, S.A. (Confecciones) is the exporter of merchandise covered by a countervailing duty determination and order; Hide-Away Creations, Ltd. (Hide-Away) is the importer. Plaintiffs instituted these actions on April 28, 1983 contesting the final results of an administrative reivew of a countervailing duty determination and order of the United States Department of Commerce, International Trade Administration (ITA) conducted pursuant to Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (Section 751) covering imports of leather wearing apparel from Mexico (48 Fed. Reg. 13474 (March 31, 1983)).

Plaintiffs seek to enjoin the assessment of countervailing duties and the collection of a cash deposit of estimated countervailing duties of $169,216.18 on the imported merchandise predicated on the ground that the administrative record establishes that the exporter, Confecciones, received no bounty or grant from the Mexican Government within the meaning of section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303. In response to the complaints, defendants have moved to dismiss, contending that the Court lacks subject matter jurisdiction, and that plaintiffs have failed to state a claim upon which relief can be granted.

On June 10, 1983 this Court granted plaintiffs' applications for temporary restraining orders enjoining defendants from liquidating any of the entries covered by the final results, *supra*, and from enforcing or implementing the final results. By stipulations dated June 29, 1983, the temporary restraining orders were extended to and including ten days after entry of the Court's ruling on defendants' motions to dismiss. Subsequently and by consent on August 29, 1983, this Court extended the temporary restraining orders to and including 20 days after entry of the Court's ruling on defendants' motions to dismiss.

Oral argument was heard on November 22, 1983.

For the reasons below, I conclude that the Court has subject matter jurisdiction and that plaintiffs have stated a claim upon which relief can be granted. I further find that these matters must be remanded to ITA for further proceedings consistent with the conclusions herein.

BACKGROUND

On April 10, 1981, ITA published notice of its final affirmative countervailing duty determination and order covering imports of leather wearing apparel from Mexico (46 Fed. Reg. 21357). According to the notice, ITA found that the Government of Mexico's tax rebate certificate program ("CEDI") constituted a bounty or grant (subsidy) within the meaning of section 303 of the Tariff Act of 1930. The United States Customs Service (Customs) was directed to continue the suspension of liquidation previously ordered in the preliminary affirmative determination published on January 14, 1981 (46 Fed. Reg. 3256); and effective April 10, 1981 a cash deposit of 5 percent *ad valorem* was required on leather wearing apparel from Mexico entering the United States, or being withdrawn from warehouse for consumption. In its final determination and order, ITA also announced that "[i]n accordance with section 751 of the Act [19 U.S.C. § 1675], the Department *intends to conduct an ad-*

ministrative review within twelve months of the publication of the countervailing duty order" (emphasis added).

However, without publication of any further prior notice, on April 19, 1982—twelve months and ten days after the publication of the final determination and order—ITA commenced the first administrative review of the countervailing duty order on leather wearing apparel from Mexico by sending a questionnaire to the Mexican Embassy in Washington, D.C. which was to forward copies to all concerned manufacturers in Mexico.

On January 21, 1983, ITA published notice of the preliminary results of its first administrative review of the countervailing duty order on leather wearing apparel from Mexico (48 Fed. Reg. 2810) covering the period of January 14, 1981 (the date liquidation was suspended in the preliminary affirmative determination (46 Fed. Reg. 21357)) through December 31, 1981. In addition to the CEDI program, which was found to be countervailable in the final affirmative countervailing duty determination, the review investigated the Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX") and the Certificates of Fiscal Promotion ("CEPROFI") programs of the Mexican Government, the latter two programs having been found countervailable in ITA's final affirmative countervailing duty determination and order covering *ceramic tile* from Mexico published on May 10, 1982 (47 Fed. Reg. 20012).

The notice explained that ITA preliminarily determined the amount of net bounty or grant bestowed by the Government of Mexico for exports of leather wearing apparel by firms other than three "certified" firms, for the period under review, to be: 10 percent of the f.o.b. invoice price under CEDI, 3.35 percent under FOMEX, and zero percent under CEPROFI, for a total of 13.35 percent of the f.o.b. invoice price.

According to the notice, ITA had set forth a certification process in the final affirmative countervailing duty order on *ceramic tile* from Mexico (which process was utilized by ITA in the instant review, as well) that would allow an adjustment of the rate of cash deposit for estimated countervailing duties to zero for firms certified and verified as having neither applied for nor received countervailable benefits. On July 2, 1982, ITA received the required certificates from these three "certified" firms as well as the corresponding verification certificates from the Mexican Government. Accordingly, it was preliminarily determined that the aggregate net bounty or grant conferred by the three programs during the period under review was zero percent for the three "certified" firms but was 13.35 percent *ad valorem* for all other firms.

ITA completed its administrative review and issued its final results (identical to the preliminary results), which were published in the Federal Register on March 31, 1983 (48 Fed. Reg. 13474).

Confecciones is a Mexican producer of leather wearing apparel which is the subject of the involved countervailing duty order and section 751 administrative review. Hide-Away purchased and imported the leather wearing apparel from Confecciones during the period of January 14 through December 31, 1981, and has continued to import such merchandise to the present.

On about January 29, 1983 plaintiffs first learned of the preliminary results in the first administrative review (published on January 21, 1983) and immediately proceeded to comply with ITA's certification procedures. Thus, on February 7, 1983—some six weeks before the publication of the final results of the first administrative review—Hide-Away wrote to the Mexican Embassy in Washington forwarding certification forms dated February 4, 1983, signed by Confecciones, stating that the latter company did not receive and will not apply for benefits under the CEDI, FOMEX and CEPROFI programs. Hide-Away's letter requested the Embassy to obtain a certificate from the Mexican Government which would establish a zero deposit duty rate for Confecciones. Thereafter, by letter dated April 20, 1983 the Mexican Embassy forwarded to ITA certifications prepared by the Government of Mexico stating that Confecciones neither received nor applied for any benefits from the three programs. The Embassy sent another letter, also dated April 20, 1983, enclosing certificates from five Mexican leather wearing apparel manufacturers, including Confecciones, and requested the zero deposit rate. Those letters were received by ITA on April 21, 1983, three weeks after publication of the final results of the administrative review.

On May 10, 1983, ITA received a letter from counsel for plaintiffs confirming: (1) that, as far back as February 7, 1983, Confecciones had submitted the required certificates to the Government of Mexico requesting vertification that Confecciones had neither applied for nor received benefits under the programs; and (2) that counsel had been informed by ITA and it had received the verifications and certificates on April 21, 1983. The letter requested ITA to include Confecciones among the firms determined to have received a total bounty or grant of zero for the period of January 14, 1981 through December 31, 1981 and any period subsequent thereto. Plaintiffs' counsel was advised by ITA that the certificates were filed too late for consideration in the first annual review, and ITA refused to grant Confecciones' claim to a zero deposit rate.[1]

JURISDICTION

We first address defendants' motions to dismiss for lack of subject matter jurisdiction.

In substance, defendants' position is that Confecciones' certificates were received by ITA too late for consideration of Confecciones' claimed zero benefit; and that the gravamen of plaintiffs' complaints is ITA's refusal to reopen the matter and to conduct a post-annual review adjustment affecting the entries covered by the completed first annual review. Based upon the rationale of this Court's decision in *Ceramica Regiomontana, S.A.* v. *United States*, 5 CIT 23, Slip Op. 83-7, 557 F. Supp. 596 (1983), defendants contend that there is no authority for ITA to make a post-annual review adjustment and this Court lacks jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) to entertain an action contesting ITA's refusal to grant plaintiffs a post-annual review adjustment.

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[1] Plaintiffs' counsel has been advised by ITA that Confecciones' certificates have been included in the current second administrative review under section 751.

Plaintiffs insist that, by the plain language of paragraphs seven through fourteen of their complaints, they are contesting the final results of the first administrative review under section 751 published in the Federal Register on March 31, 1983 in that such results failed to include Confecciones as a "zero duty deposit rate" company (plaintiffs' memoranda, at 12). Accordingly, argue plaintiffs, the Court has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

I agree with plaintiffs' argument, and find that defendants' reliance upon *Ceramica* is misplaced.

In *Ceramica*, the plaintiff had applied to ITA for an interim reduction of the estimated countervailing duty cash deposit rate on imports of ceramic tile from Mexico. Plaintiff's application for an interim adjustment was made after the final countervailing duty order and prior to the review under section 751. After ITA's refusal to grant plaintiff an interim adjustment, plaintiff sought an order of mandamus from this Court to compel ITA to make an immediate adjustment and predicated the Court's jurisdiction upon 28 U.S.C. § 1581(i). Defendants and the intervenor cross-moved for dismissal of the action on the grounds that the Court of International Trade lacked subject matter jurisdiction and that plaintiff had failed to state a claim upon which relief can be granted.

The cross-motion to dismiss for lack of jurisdiction was denied. While it was undisputed that the Court lacked subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), section 1581(i) was held to be an appropriate basis for jurisdiction: "Since the contested ITA decision was made outside the scope of any administrative proceeding which ultimately would result in a determination reviewable under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), obviously this is the circumstance in which Congress intended that the Court's residual jurisdiction could be invoked". 557 F. Supp. at 600.

Accordingly, in *Ceramica* this Court found that it had subject matter jurisdiction under section 1581(i) to determine whether ITA was authorized to adjust the countervailing duty deposit rate established by the final order prior to an administrative review under section 751. However, this Court went on to find that ITA lacks authority to modify the estimated countervailing duty cash deposit rate prior to and outside the scope of the administrative review provisions in section 751, and that consequently, the complaint failed to state a claim upon which relief could be granted.

Unlike the circumstances in *Ceramica* where, as noted above, plaintiff there sought an order compelling ITA to make an interim adjustment of a duty deposit rate prior to and outside the scope of the proceedings prescribed by section 751, here plaintiffs seek review of the final results of the first administrative review under section 751. I therefore conclude that plaintiffs' alleged aggrievance by the final results of the section 751 review falls within this Court's jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

Since plaintiffs' complaints state sufficient facts giving the Court jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), the complaints are not "technically defective" under Rule 8(a) of the Rules of this Court, as claimed by defendants, for failure to specifically plead section 1581(c). *See City Federal Savings and Loan Association* v. *Crowley,* 393 F. Supp. 644, 650 (E.D. Wis. 1975); *James* v. *Ambrose,* 367 F. Supp. 131, 1324 (D. St. Croix, Virgin Is., 1973).

FAILURE TO STATE A CLAIM

Turning to the other branch of defendants' motions to dismiss—failure to state a claim upon which relief can be granted—we must observe the fundamental rule that for purposes of such motion, all relevant and material facts well pleaded in the complaint must be taken as true or admitted. 2A Moore's Federal Practice ¶1208, at 266 6,7 (2d ed. 1982); 35B C.J.S. *Fed. Civ. Proc.* § 854 (1960).

The complaints in the instant cases, contesting the final results of the first administrative review, allege *inter alia,* that during the period covered by the review Confecciones neither applied for nor received benefits under any of the Mexican Government's subsidy programs, and hence Confecciones should have been included among the firms determined by ITA to have received a total bounty or grant of zero for the period in question. Continuing, the complaints allege that in accordance with the certification process, ITA received certificates pertaining to Confecciones from the Government of Mexico verifying that Confecciones neither applied for nor received benefits under any of the programs. Deeming the factual allegations of the respective complaints as admitted by defendants, I find that the complaints state a claim upon which relief can be granted. Since so far as the complaints are concerned, plaintiffs seek no relief outside the scope of the section 751 review, the present cases are plainly distinguishable from *Ceramica.*

For the reasons stated above, defendants' motions to dismiss are denied.

NOTICE

Defendants have not yet filed their answers to the complaints, and hence the cases are not at issue on the merits. Nevertheless, in the interest of completing the record and hopefully expediting the disposition of these cases for the sake of judicial economy, the Court has considered and will rule on the question of notice under section 751, well-briefed and skillfully argued by the parties.[2] On this aspect of the cases, plaintiffs contend that ITA failed to publish in the Federal Register notice of the initiation of the first section 751 review of the countervailing duty order on leather wearing apparel from Mexico, as required by the statute. Such procedural irregularity, plaintiffs insist, was substantial and prejudicial, with the result that the first administrative review is null and void with respect to plaintiffs.

Defendants do not dispute the statutory requirement for publication of notice in the Federal Register announcing the initiation of the first administrative review which commenced on April 19, 1982. However, defendants posit that such notice requirement was satisfied by ITA's statement of intent to conduct a review within 12 months of the order, which statement was included in the notice of the final affirmative countervailing duty determination and order published on April 10, 1981 (46 Fed. Reg. 21357).

I am unable to agree with defendants' contention. Not only is it inexplicable why a notice allegedly published in accordance with section 751 would be published one year and ten days in advance of the actual date of initiation of the review, a specific date of initiation was never noticed by the ITA. Obviously, a notice of intent to conduct an administrative review without indication of a specific date for initiation makes a mockery of the notice requirement of section 751. Moreover, it is not logical for interested parties to assume that a mere statement of intent to conduct a review at some unspecified time within twelve months constitutes the notice required by section 751.

The short of the matter is that defendants' construction of the statute, as requiring nothing more than notice of intent to conduct a section 751 review within twelve months, is palpably unreasonable and must be rejected.

Plaintiffs, who (according to an affidavit submitted to the Court) initially became aware of the first administrative review and ITA's certification methodology for a zero deposit rate shortly after publication on January 21, 1983 of the preliminary results (48 Fed. Reg. 2810), maintain that ITA's failure to publish notice of the initiation of the first administrative review is a substantial procedural irregularity and entirely prejudicial. Thus, argue plaintiffs, the results of the first administrative review are null and void respecting plaintiffs.

In *Woodrum* v. *Donovan,* 4 CIT 46, 544 F. Supp. 202 (1982), *rehearing denied,* 4 CIT 130 (1982), *decision on remand,* 5 CIT 191, 564 F. Supp. 826 (1983), *appeal pending,* relied upon by plaintiffs, Chief Judge Re held that the Secretary of Labor, in determining that plaintiffs were not eligible for trade adjustment assistance benefits under the Trade Act of 1974, failed to comply with the mandatory procedural requirements of the statute, including *inter alia,* publication of notice relative to receipt of a petition and initiation of an investigation. Chief Judge Re found that these procedural irregularities prejudiced the rights of the plaintiffs, and so far as pertinent to the present case, aptly stated (544 F. Supp. at 207):

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[2] The Court wishes to express its appreciation to counsel for their cooperation and conducting these cases in the best traditions of our profession.

> The facts of the present case indicate that the Secretary's failure to conduct an investigation or publish the required notices *did not serve the ends of justice, but only the administrative convenience of the agency.*
>
> When, as in the present case, agency action is taken without observance of procedure required by law, courts are empowered to set aside that action. Administrative Procedure Act § 706(2)(D), 5 U.S.C. § 706(2)(D) (1976). Nevertheless, as defendant correctly points out, courts will not set aside agency action unless the procedural errors complained of were prejudicial to the party seeking to have the action declared invalid. *John V. Carr & Son, Inc.* v. *United States,* 69 Cust. Ct. 78, 87, C.D. 4377, 347 F. Supp. 1390 (1972), *Aff'd* 61 CCPA 52, C.A.D. 1118, 496 F.2d 1225 (1974).
>
> The Secretary of Labor's failure to publish a notice and summary of his final determination in the Federal Register did not prejudice the rights of the plaintiffs in this action. Therefore, that error would not, by itself, compel the court to set aside the Secretary's determination. This cannot be said of the Secretary's failure to conduct an investigation, *and his failure to publish notice of the receipt of a petition. These procedural errors had the effect of excluding from the administrative record facts which are directly relevant to the Secretary's determination* that plaintiffs are not eligible for trade adjustment benefits. [Emphasis added.]

Analogous to the situation in *Woodrum,* the procedural error here by ITA in failing to publish a proper notice in the Federal Register prior to the initiation of the first administrative review resulted in substantial prejudice to plaintiffs, *i.e.,* the late filing and exclusion from administrative review of evidence directly relevant to Confecciones' zero benefit status. Absent publication in the Federal Register of the date that the first administrative review would be initiated, there were no other means prescribed by the statute for plaintiffs to have ascertained the actual date of the commencement of the first section 751 review. The statute places an explicit obligation on ITA to publish a notice in the Federal Register prior to initiation of an administrative review, but not an obligation on parties to make periodic inquiries of ITA as to whether an administrative review has commenced.

I find, that under the circumstances, plaintiffs exercised good faith in their efforts to comply with the certification procedures specified by ITA to obtain a zero duty deposit rate; and more, that plaintiffs were prejudiced by ITA's failure to publish a timely and proper notice of the initiation of the first administrative review. Despite plaintiffs' best efforts to comply with the certification process established by ITA, Confecciones' certificates failed to reach ITA via the Mexican Embassy in time for the first administrative review.[3]

Although section 751 itself dictates the general time-frame for conduct of the administrative review (*viz.*, at least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order), nevertheless, interested parties are not apprised by the statute itself as to a specific date for the initiation of a particular review. This circumstance was recognized by Congress in providing that an administrative review would be conducted "*after* publication of notice of such review in the Federal Register" (emphasis added). Therefore, published notice of the *specific date* for a commencement of an administrative review is vital to afford an opportunity for participation by all interested parties, and hence such published notice is mandated by the statute prior to the agency's initiation of the review proceedings.

As noted above, ITA failed to publish notice in the Federal Register regarding the specific date for commencement of the first administrative review, and as a consequence plaintiffs were prejudiced by lack of proper notice. In *Woodrum*, wherein the failure of the Secretary of Labor to publish notice of receipt of a petition and the initiation of an investigation resulted in prejudice to plaintiffs, the matter was remanded to the Secretary for further proceedings. Here, Confecciones' certificates were received by ITA after publication of the final results of the section 751 review, and therefore the certificates are not technically part of the administrative record notwithstanding that they were transmitted by ITA to the Court as such. Defendants' observation that *de novo* review of countervailing duty proceedings is precluded under the Trade Agreements Act of 1979 is accurate. 19 U.S.C. § 1516a(b)(2).

In all candor, while the Court appreciates defendants' position to be that under section 751, ITA had no authority to consider Confecciones' certificates subsequent to publication of ITA's final results of the first administrative review, under all the facts and circumstances, the significant factor of lack of proper notice by ITA warrants remand at this juncture for ITA's consideration of Confecciones' certificates.

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[3] Defendants acknowledge that Confecciones' certificates submitted to ITA for the first administrative review were accepted by ITA for the second administrative review. Based on these same certificates, Confecciones has now been accorded "zero deposit rate status" in the second section 751 review as evidenced by the Notice of Preliminary Results (48 Fed. Reg. 43707 (1983)).

An indisputed affidavit by a certified public accountaint, submitted by plaintiffs, indicates that if Confecciones certificates are not considered by ITA in the *first* administrative review, the importer faces assessment of $159,216.18 in countervailing duties *notwithstanding* that the certificates indicate that Confecciones neither received nor applied for benefits under the Mexican subsidy programs.

CONCLUSION

In summary, the Court of International Trade has subject matter jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), and the complaints herein state a claim upon which relief can be granted. Further, ITA failed to publish prior notice of the specific date of the initiation of its first administrative review pursuant to section 751 of the subject countervailing duty order; and plaintiffs were prejudiced thereby, *i.e.,* exclusion of Confecciones' certificates from the final results of the administrative review published on March 31, 1983. Under the facts and circumstances herein, these matters will be remanded to ITA for its consideration of Confecciones' certificates, and for reconsideration of the final results of its administrative review under section 751.

Accordingly, it is hereby ORDERED:

1. That defendants' motions to dismiss are denied;
2. That these matters are remanded to ITA for further proceedings in connection with its administrative review of the countervailing duty determination and order conducted pursuant to section 751 covering imports of leather wearing apparel from Mexico (48 Fed. Reg. 13474 (March 31, 1983));
3. That within 30 days of the service of this order: ITA shall review as part of the administrative record in these matters the zero deposit rate certifications pertaining to Confecciones received by ITA on April 21, 1983 and any matters pertinent thereto; and ITA shall publish in the Federal Register supplemental final results of its administrative review published on March 31, 1983 (48 Fed. Reg. 13474). Certified copies of said supplemental final results shall be transmitted to the Clerk of the United States Court of International Trade and also shall be served upon plaintiffs.
4. That the temporary injunctions are extended to 20 days after final disposition by the Court following remand.

MICHELIN TIRE CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-9-02467

Before WATSON, *Judge.*

Countervailing Duties—Valuation of Grants

The Court disapproves the use of an annuity calculation for expressing the benefit received from grants used to purchase capital assets. The Court approves the use of an interest factor in the calculation of the benefit received over the life of the assets. The Court finds error in the use of an interest factor which was not derived from a finding as to the particular circumstances of the beneficiary. The case is remanded for further proceedings.

[Remanded.]

(Decided December 22, 1983)

Windels, Marx, Davies & Ives (Paul Windels, Jr. and *John Y. Taggart* of counsel) for plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director Commercial Litigation Branch *(Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch; *Berniece A. Browne,* Senior Trial Counsel, Office of the Assistant General Counsel for Import Administration, U.S. Department of Commerce) for defendant.

Frederick L. Ikenson, P.C. *(Frederick L. Ikenson* of counsel) as *amicus curiae.*

WATSON, *Judge:* In this opinion the Court, for the third time, approaches the question of the valuation of certain cash grants received by Michelin Canada, a tire producer. These grants were part of the basis for the assessment of countervailing duties on x-radial steel belted tires produced by Michelin Canada and imported by plaintiff, Michelin Tire Corporation. In its first decision on the subject, the Court, among other things, found that the grants were no longer linked to the repayment of certain loans and therefore should not have their benefit allocated over the period of the loans. The Court remanded the question of the proper allocation period. *Michelin Tire Corp.* v. *United States,* 2 CIT 143 (1981). In the next opinion, the Court disapproved the method by which the International Trade Administration of the Department of Commerce (ITA) had allocated the face value of the grants over *half* the useful life of the assets which they were used to purchase. *Michelin Tire Corp.* v. *United States,* 4 CIT 252 (1982). The Court criticized the method as an arbitrary allocation of benefit. The Court remanded the matter again and spoke approvingly of a method which would recognize the time value of money over the life of the assets purchased. In the latest administrative determination the ITA has used a method which takes into account the time value of money. It incorporates this method into a calculation known as the present value of an annuity, a technique which has its most familiar use in the calculation of the standard home mortgage repayment schedule.

The Court, although it approves the recognition of the time value of money, finds the annuity method used by the ITA to be incorrect for use in the valuation of these grants. As will shortly be discussed, the method creates an imbalance between the real subsidy and the calculated subsidy in each year.

When the Court, in its last opinion, suggested reliance on accepted principles of accounting, or financial analysis, it did not expect to find a tailor-made formula for these particular investigative circumstances. It sought only such reasonable techniques as would accomplish the fundamental purposes of the law. These techniques cannot be allowed to cause significant deviations from the basic correspondence of the subsidy to the benefit. In these matters, the Court will continue to place its ultimate reliance on essential principles of reason and law, drawing on the special techniques of other areas only to the extent that they remain useful tools in the traditional, common-sense interpretation and application of the law.

The ITA determined what series of equal, annual amounts spread over the life of the assets purchased with the grant would yield a grand total equal to all the present values of the grant money if the grant was divided equally over the life of the asset, but expressed in each year as amounts whose future value is kept equal in real terms to the original present value by means of the addition of interest. In other words, it determined what the future value of the annual divisions of the money granted would have to be in order to maintain the complete present value of the grant and then divided that sum into equal portions over the life of the asset purchased with the grant.

This method can be expressed in the formula

$$PV = a \left[\frac{1}{(1+r)^{0}} + \frac{1}{(1+r)^{1}} + \frac{1}{(1+r)^{2}} + \ldots + \frac{1}{(1+r)^{n-1}} \right]$$

where "PV" equals the grant amount in the year of receipt and "a" equals the unknown amount of an annual annuity payment. Within the bracketed section each fraction represents one year's portion of the discounting of a series of payments as discounted in accordance with "r," the interest factor, over "n," the number of years. As written, each fraction can be viewed as showing the annual reduction which occurs in a given sum if the interest rate contained in the numerator is assumed. The entire series of fractions provides a total of all the discounting that will occur during the time period in which receipt of benefits will occur. For a sum of benefits to retain the present value known and expressed as "PV" when divided over the years, it must equal the unknown "a" as multiplied or "affected" by the sum of the fractional reductions anticipated. The equation can then be solved for the unknown "a," which will be that equal annual amount, which, when subjected to the anticpated discounting expressed in the interest factor, has a present value in the amount desired—in this case the amount granted.

The method is criticized by plaintiff. Plaintiff first argues that the method should not have been adopted without compliance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* It also argues that the method is an unlawful, retroactive application of an administration rule.

Those arguments have no merit. This Court's Order of Remand set the terms for the ITA's determinations and did not require or contemplate rulemaking. The ITA's methodology arises from its investigative obligations in the particular case and need not be made the subject of a separate proceeding. See *NLRB* v. *Bell Aerospace*

Company, 416 U.S. 267, 290–95 (1973). It need not be a continuation of previous administrative practices. In any event, the parties had a full opportunity to comment and provide information during the administrative proceeding. The substantive requirements of fairness have been satisfied.

With regard to the method itself, plaintiff criticizes the annuity technique as unlawfully and disproportionately offsetting the subsidy in the earlier years. The method is also criticized for overstating the interest rate used to maintain the value of the grant over the years, for failing to use the interest rate at the time of the drawdown of the funds, and for failing to take into account that after-tax benefits would tend to reduce the real rate of interest paid by a corporate borrower and should therefore reduce the rate of interest applied to the grant to maintain its value over the years. In general, plaintiff criticizes the method as leading to the assessment of duty on more than the face value of the grant, in violation of 19 U.S.C. § 1303 and in violation of Article 4.(2) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (GATT).

Amicus criticizes the results but refrains from urging a further remand on the ground that its arguments could only result in the necessity for the determination of a higher rate of duty—the collection of which is barred in any event by case law. *Beacon Cycle and Supply Co.* v. *United States,* 81 Cust. Ct. 46, C.D. 4764 (1978).

Amicus' criticisms are directed to what are, in its view, harmless errors in the context of this proceeding, i.e., the failure of the Department of Commerce to use realistic interest rates in its calculations and its failure to adopt a method which calculates the avoidance of future interest payments as a present benefit.

The Court finds it necessary to go forward to state its views with respect to the correctness of the ITA methodology because it cannot say with certainty that the faults it finds will result in an uncollectable higher rate of duty.

I

According to plaintiff, the time value of a grant, if it is to be calculated, should be done as if the portions of the grant allocated to future years (over the life of the asset they purchase) were earning interest until they materialized into the asset in the year of their allocation. Thus, the benefit is expressed as increasing amounts over the years in accordance with the effect of a prevailing compounded rate of return on the equal portions allocated to each year. The method preferred by plaintiff yields the following table for an example in which a $10,000 grant is used to purchase an asset with a life of ten years and $1000 of the grant is allocated to each of the ten years.

Table I

Year	Compounded rate of return	Amount to be countervailed
1	$(1.1)^0 = 1$	$1,000
2	$(1.1)^1 = 1.1$	1,100
3	$(1.1)^2 = 1.21$	1,210
4	$(1.1)^3 = 1.331$	1,331
5	$(1.1)^4 = 1.464$	1,464
6	$(1.1)^5 = 1.611$	1,611
7	$(1.1)^6 = 1.772$	1,772
8	$(1.1)^7 = 1.949$	1,949
9	$(1.1)^8 = 2.144$	2,144
10	$(1.1)^9 = 2.358$	2,358
Total		15,939

Plaintiff argues that on these terms a company would be indifferent to the receipt of the original total grant or the annual allocations of the grant amounts in each year, over the years. According to plaintiff this demonstrates that the full time value of the grant will be recaptured by this method and the company will receive no greater benefit from the original total than from the later allocations.

As will shortly be discussed in detail, the real benefit to the company is not an abstract investment which it could make at a prevailing rate of interest. The benefit of the grant is the elimination of the costs of the commercial alternatives. The real question is to discover what would make a company indifferent to the opportunity to obtain capital assets for nothing. The plain answer is that only a method which applies to the gift the costs of the most likely commercial alternative can accomplish this purpose. That method must be one which approximates as accurately as possible the costs of the most likely alternative and, in attributing those costs to the grant, eliminates any direct preference which could exist between the grant and the alternative.

With this in mind, the Court turns to the two principal questions in the case, the ITA's use of an annuity method and the time value or interest factor which must be used in correctly valuing the grants in issue.

II

The method derived from the present value of an annuity is not in accordance with the law. It does not correspond to the subsidy benefit within the annual period most suited for the determination and assessment of countervailing duties. It does not accurately express the benefit in each year in the manner in which the genuine commercial alternatives available to a company would be expressed. In effect, it is an unjustified equalization of amounts which should be different in each year in accordance with the different effects which time has on the money granted and the different adjustments which have to be made to balance those effects over the time the grants are providing benefits.

The practical effect of the annuity method can be seen in the $10,000 example earlier discussed. The method used by the ITA[1] yields the amount of $1,480 to be countervailed in each of the 10 years, yielding a total of $14,800.

The Court understands the law to require a correspondence between the duty and the benefit, in accordance with the most likely commercial alternatives. The annuity formula does not accurately express the benefit in those terms. The fact that it may be easy to administer and understand does not overcome this basic flaw.

III

On the subject of the interest factor to be utilized in the calculation of the benefit the ITA has erred by deliberately trying to treat that important element of benefit in a neutral manner.

The benefits which must be withdrawn by payment of duty in the case of a subsidy are the benefits which result as a direct consequence of the subsidy. For a business, the direct consequences of receiving a gift of money normally are the elimination of the necessity of looking elsewhere for those funds and paying the price required by the alternative source of funds. The normal alternative sources of funding for business enterprises are two—the sale of shares in the business, carrying with it the obligation to share the profits, or the incurring of debt, carrying with it the obligation to repay the creditor with interest.

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[1] The ITA calculation of the annual amount of countervailing duty is done as follows in accordance with the formula set out in the text of the decision.

Step 1 $\$10{,}000 = \frac{x}{(1.1)^0} + \frac{x}{(1.1)^1} + \frac{x}{(1.1)^2} + \frac{x}{(1.1)^3} + \frac{x}{(1.1)^4}$

$+ \frac{x}{(1.1)^5} + \frac{x}{(1.1)^6} + \frac{x}{(1.1)^7} + \frac{x}{(1.1)^8} + \frac{x}{(1.1)^9}$

Step 2 $\$10{,}000 = \frac{x}{1} + \frac{x}{1.1} + \frac{x}{1.21} + \frac{x}{1.331} + \frac{x}{1.4641}$

$+ \frac{x}{1.6105} + \frac{x}{1.7716} + \frac{x}{1.9487} + \frac{x}{2.1436} + \frac{x}{2.3579}$

Step 3 $\$10{,}000 = X + .9091X + .8264X + .7513X + .6830X + .6209X + .5645X + .5132X + .4665X + .4241X$

Step 4 $\$10{,}000 = 6.7590X$

Solution $\$1{,}480 = X$

When a benefactor bestows a subsidy on a business, a fundamental and minimal part of the benefit is the elimination of the consequences to the beneficiary of the most likely alternative. In the case of a company with an ability to utilize alternative financing methods it will ordinarily be the duty of the administrative agency to determine, on the basis of the evidence, what alternative method would be used. In this case, which has been tried *de novo* by the Court, the Court finds from the evidence of record, that in the circumstances of Michelin Canada the alternative method of obtaining the funds in question would have been by debt financing.

The final question now turns to the interest factor used by the ITA in its attempt to incorporate the time value of money into its calculation of the subsidy. The basic flaw in the method used is the assumption that the movement of money through time is a neutral and abstract exercise in these matters. However, when properly viewed as a substitute for alternative methods of financing, the value of money given to a beneficiary is directly related to the cost of those alternatives to that particular beneficiary. To the extent that the grant relieves the beneficiary of the need to obtain alternative financing, it is the interest rate associated with that alternative which is the real and ascertainable benefit.

If this is not done, we have the unacceptable situation in which the effect of the most complete and generous form of subsidy—the outright grant—is measured by a looser standard than the less beneficient forms such as loans at preferential rates. A grant to a business is a gift which, in its very nature includes and surpasses the benefits of a preferential loan. The purity of the benefit bestowed by a grant should not immunize it from measurement in the most reasonable commercial terms. This measurement must be specific for each recipient in order for it to be reasonable within the intendment of the countervailing duty law. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 74,75 (1979).

The use by the ITA of a rate of interest derived from long-term Canadian government bonds was flawed and not in accordance with the law, because it was not based on a finding of fact that Michelin Canada would have had to pay that rate for alternative financing.

It is a countervailing duty law that we are interpreting and, in its very nature, it must focus on the effect of subsidies on particular beneficiaries. This is not a law in which basic differences between grant recipients can be overlooked or elided for the sake of administrative convenience. The value of money, expressed in terms of interest is too significant a part of a benefit to be homogenized for all beneficiaries.

Ordinarily, it will be the duty of the ITA to determine, on the basis of the evidence, what would have been the cost to the beneficiary of the most likely alternative—in this case, the interest rate for debt financing. Here, once again because the Court has tried this case *de novo,* the court decides one element of the interest rate determination based on the record, namely, that the alternative financing would have taken place in the Swiss bond market. The determination of the exact rate is left for the expertise of the ITA based on evidence which it has, or may obtain, regarding the interest terms which would been applied to the alternative financing.

When the interest rate on the alternative financing is applied to the grant in a manner which expresses the value of the grant over the years of its usefulness and maintains a correspondence to the benefit in each year, the statute will be satisfied.

At this point, the Court, based on the record in this case, including particularly the record on remand and the subsequent briefs, is finally in a position to determine a suitable method for valuation of the grants involved in this action.

The Court holds that for its purposes in deciding this action the correct method of valuing the subsidy provided by these grants is the following: The principal amount of the grant is allocated on a straight-line basis over the life of the asset it was used to purchase. To that amount in each year is added the interest expense in accordance with the interest which the beneficiary would have to pay on the remaining balance of the principal in accordance with the normal commercial financial practices. This method can be expressed in a formula as follows:

$$B = \frac{P}{n} + r \left[P - (x-1) \left(\frac{(P)}{n} \right) \right]$$

B is the amount of benefit which must be countervailed in a given year. That amount is equal to "P," the face amount of the subsidy divided by "n," the number of years over which the benefits of P will be experienced (yielding the annual amount of principal) *plus* the amount of "r," (interest) that would be owing on the principal not yet allocated, which unallocated principal is expressed as the original face amount "P," less the number of annual principal amounts

$$\frac{\text{"P"}}{n,}$$

times "x−1," the full years which have passed since the bestowal of the grant, ("x" being the year for which the calculation is being made).

This formula, although it does not achieve an Einsteinian simplicity, expresses the benefits in the most realistic possible commercial terms. It maintains a correspondence between the actual benefit and the amount to be countervailed at all points in the history of the benefit. It represents the fairest and most reasonable method of determining the benefit which flows from the grants involved in this action.

IV

The refinements in method which plaintiff would like to see, if indeed an interest factor is to be utilized, are not required by the law.

Plaintiff argues for the inclusion of after-tax considerations in the calculation of the subsidy. This would require a calculation of the tax deduction which would theoretically result from the payment of interest on alternative financing. That would reduce the cost of the alternative financing, reduce the benefit of taking a grant, and thereby reduce the subsidy. In short, plaintiff argues that the tax advantages of alternative debt financing ought to be considered to reduce the advantage which the outright grant bestows.

This argument cannot be accepted because it takes the administration of the law into the area of secondary effects. These effects are too uncertain to be considered a necessary part of a subsidy calculation in these circumstances. The Court notes that Michelin Canada paid no taxes during the period involved in this case.

Plaintiff also argues that the rate of interest should be determined as of the dates the money was actually received rather than the date of the agreements and further, that interest rate calculations should be made on a monthly rather than yearly basis. These are also matters which do not amount to requirements of the law. The date on which a party receives money has no particular relation to the time of measurement of its commercial alternatives and the interest rate attached to those alternatives. As for monthly interest rates, the annual period can certainly be preferred for reference to transactions which are normally measured in annual terms. For transactions of these types a year is a normal and reasonable period of measurement.

Plaintiff claims that a method which goes beyond the face value of a grant violates the terms of the countervailing duty law, which in 19 U.S.C. § 1303 speaks of a duty "equal" to the net amount of the grant. Plaintiff also claims that the method violates the provision of GATT which makes it impermissible for a signatory to impose a countervailing duty in excess of the amount of the subsidy found to exist. Article 4.(2) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.

The Court does not read the language of the law or the international agreement as requiring that the valuation of subsidies be limited to their face value. On the contrary, the law and the international agreement obviously foresee a process of measurement.

No authority has been cited for the proposition that a grant whose benefit is to be experienced over a term of years is permanently fixed in the exact form and amount in which it is initially bestowed. The reality of financial experience is that money is affected by time and those methods which reasonably adjust to this commercial reality do nothing more than preserve and express the full meaning of the original financial transaction. For this reason the Court finds that a method of providing for the time value of money is in harmony with the law and with the relevant international agreements.

For the reasons expressed herein, and due to the possibility that the Court's decision may result in a reduction of the countervailing duty, this action is remanded to the ITA for further proceedings in accordance with this opinion. The parties are directed to confer with each other and attempt to agree on a schedule for proceeding on remand and for reporting the results to the Court. If the parties cannot reach agreement within 30 days the Court will order a schedule for further proceedings.

ROQUETTE FRERES AND ROQUETTE CORPORATION, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 83-11-01683

Before BOE, *Judge.*

Memorandum Opinion and Order on Cross-Motion To Dismiss

[Cross-motion to dismiss granted.]

(Decided December 21, 1983)

The defendant has moved to dismiss the above action, on the grounds:

(1) That said action attempts to challenge a determination by the International Trade Commission (ITC), said determination having been made pursuant to an order made by this court in Court No. 82-5-00636, and

(2) That the above action is duplicative of Court No. 82-5-00636.

In entering this order, the court has considered all papers and documents filed, the memoranda of respective counsel, and the arguments presented by said counsel at an oral argument held on December 21, 1983.

At the conclusion of oral argument, the court granted defendant's cross-motion to dismiss. The within memorandum opinion is made for the purpose of more fully expressing the reasoning of this court.

The facts pertinent to a determination of the instant cross-motion are briefly reviewed. The plaintiffs instituted an action (Court No. 82-5-00636) in this court by filing a summons on May 7, 1982 and a complaint on June 4, 1982 challenging:

(1) The final determination of the Department of Commerce, International Trade Administration that crystalline and liquid sorbitol from France are being, or are likely to be, sold in the United States at less than fair value, and

(2) The final determination of the International Trade Commission (ITC) that an industry in the United States is materially injured by reason of imports of liquid and crystalline sorbitol from France, and

(3) The issuance of an antidumping order by the Department of Commerce.

After the transmittal of the administrative record to this court for review and subsequently, upon motion of the defendant, this court entered an order under date of July 18, 1983 remanding the action to the ITC, providing in part:

> [T]o consider in full all relevant information presently in its possession or which hereafter may be presented to it as to whether an industry was materially injured by reason of imported sorbitol from France being sold at less than fair value. The determination so made by the Commission shall be returned to this court within a period of sixty (60) days from the date of entry of this order.

On remand the ITC determined that:

(1) An industry in the United States was materially injured by reason of crystalline sorbitol imports from France, and

(2) That an industry in the United States was not materially injured or threatened with material injury by reason of liquid sorbitol imports from France.

The determination of the ITC on remand was filed with the court on October 17, 1983; the supplemental administrative record of the proceedings on remand was filed on November 23, 1983. The plaintiffs by the filing of a summons and complaint in the above action seek to challenge the final determination of the United States International Trade Commission on remand.

The jurisdiction of this court acquired by the filing of the summons on May 7, 1982 and the complaint on June 4, 1982, is continuing until that action is finally decided.

Remand is well recognized and utilized by the courts in appellate review. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure,* § 3937 (1977). The procedure is utilized particularly by those courts in which jurisdiction is vested to review the administrative decisions of boards, agencies, and commissions. When the initial action, Court No. 82-5-00636, was remanded to the ITC pursuant to the order of this court no final decision had been made by the court. As stated by the United States Supreme Court in addressing itself to the remand process:

> [W]hen the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. *Ford Motor Company* v. *Labor Board*, 305 U.S. 364, 374–75. When finally decided, all questions were still open and could be presented.

United States v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950).

Jurisdiction once vested in the court is neither so fleeting nor illusory as to dissipate upon the court's exercise of its inherent discretionary power to require further deliberation by the administrative body.

To entertain the above action challenging the final determination of the ITC on remand serves only to encumber the record and produce unnecessary and unjustified delay in a review proceeding in which this court by order requested clarification and amplification from the administrative commission.

Should the plaintiff deem its complaint inadequate because of the subsequent ITC determination on remand, its remedy is clear. Rule 15 of this court provides for amended and supplemental pleadings. Subsection (d) thereto, in providing for supplemental pleadings, contemplates the happening of "transactions or occurrences" since the date of the pleading sought to be supplemented. Rule 15(d) of the Court of International Trade Rules.

Suffice it to say, to permit the initiation of a new action by the filing of a new summons and complaint in a proceeding wherein this court has specifically retained its jurisdiction for review purposes would serve no purpose other than to impede sound judicial administration.

Now therefore, it is hereby

Ordered that the cross-motion of the defendant is hereby granted and the above entitled action, Court No. 83-11-01683, is hereby dismissed, and it is further

Ordered that the plaintiff, if it so desires, may serve on the defendant and the intervenor in Court No. 82-5-00636 and file physically with this court on or before January 4, 1984 a supplement to the complaint filed under date of June 4, 1982 setting forth, as provided in rule 15(d) "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," and it is further

Ordered that in Court No. 82-5-00636 the intervenor may serve on the plaintiff and the defendant and file physically with this court on or before January 4, 1984 such supplemental pleadings as it may desire, and it is further

Ordered that the responses to all supplemental pleadings, filed pursuant to this order, shall be served and filed physically with this court on or before January 9, 1984.

United States Steel Corporation, Republic Steel Corporation, et al., plaintiffs *v.* United States of America, et al., defendants, and Companhia Siderurgica Paulista, et al., defendants-intervenors

Court No. 82-10-01361

United States Steel Corporation, plaintiff *v.* United States of America, et al., defendants, and Companhia, Siderurgica Paulista, et al., defendants-intervenors

Court No. 82-10-01361S

Before Watson, *Judge.*

Memorandum Opinion and Order on Defendant's Motion for Protective Order

[Motion granted.]

(Decided December 22, 1983)

Richard K. Willard, Acting Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch *(Velta A. Melnbrencis* and *Francis J. Sailer,* Attorneys, Commercial Litigation Branch) for the United States.

Cravath, Swaine & Moore (*Joseph R. Sahid* and *Steven Schulman,* of counsel) for plaintiffs Republic Steel Corporation, Inland Steel Company, Jones & Laughlin Steel Incorporated, National Steel Corporation, and Cyclops Corporation.

Watson, *Judge:* In this decision the Court grants defendant's motion for a protective order relieving them of the obligation to respond to plaintiffs' interrogatories and request for production of documents.

Plaintiffs based the discovery they sought on an alleged failure to articulate the administrative findings and an apparent incompleteness of the administrative record.

The Court has examined a significant portion of the administrative record in connection with defendants' motion for a protective order on the grounds of deliberative privilege, which was partially granted in Slip Opinion 83-127 (December 7, 1983). It has also considered those points which plaintiffs believe represent gaps or omissions in the record. As a result, the Court has not been persuaded that the administrative record is deficient for the purposes of review or flawed in such a manner as to require supplementation by discovery. *Atlantic Sugar, Ltd.* v. *United States,* 85 Cust. Ct. 131; C.R.D. 80-16 (1980).

The articulation of the administrative decisions is also sufficient to permit judicial review.

For these reasons, defendants' motion for a protective order is GRANTED.

GRAY TOOL COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-10-01452

Before BERNARD NEWMAN, *Judge.*

On Plaintiff's Motion To Amend Summons

Plaintiff's motion to amend the summons to contest classification of subject merchandise must be denied where the only administrative decision contested in protest by plaintiff was appraisement. Pursuant to 28 U.S.C. § 2638 a new ground in support of this action cannot be asserted in the summons (or amended summons) where such new ground is not related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

[Plaintiff's motion denied.]

(Dated December 27, 1983)

Mandel and Grunfeld, Esqs. (Bruce M. Mitchell, Esq. of counsel) for plaintiff.

Richard K. Willard, Acting Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Judith M. Barzilay, Esq.* for defendant.

BERNARD NEWMAN, *Judge:* Plaintiff has moved under Rule 3(d) of the Rules of the Court of International Trade[1] to amend its summons to include a new claim. Defendant opposes the proposed amendment.

The pertinent facts may be briefly stated:

The summons filed by plaintiff encompasses one protest covering merchandise described as "tubing bonnets". On the second page of the summons, plaintiff indicated that the contested administrative decision was the *appraised value* of the merchandise. There is no indication in the summons that plaintiff had protested Customs' *classification* decision.[2] Plaintiff now seeks to amend its summons to include as a new ground in support of its civil action that the merchandise was improperly classified by Customs.

Defendant maintains that since plaintiff in its protest (Customs Form 19) contested only the appraisement of the merchandise, assertion of a classification claim in an amended summons is now precluded.

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[1] This rule reads: "Amendment of Summons. The court may allow a summons to be amended at any time, in its discretion and upon such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed."

[2] The second page of the preprinted summons form provides space to indicate whether the appraised value of the merchandise and/or the classification, rate or amount of duty are contested, but only the section respecting the appraised value of the merchandise is filled in. The space allocated for classification, rate or amount was left blank.

In sum, the issue presented by plaintiff's motion is whether a classification claim may be asserted in the summons (or amended summons) where the protest challenged only the appraisement of the merchandise.

Under 19 U.S.C § 1514(b), a protest must set forth "distinctly and specifically each decision described in subsection (a) as to which protest is made". I find from a reading of the protest that while plaintiff's challenge to the appraisement is clearly indicated, plaintiff did not contest the classification of the merchandise.[3] Under these circumstances, plaintiff's motion to amend the summons to assert a new ground in support of its civil action must be denied.

Although not cited by either party, 28 U.S.C. § 2638 is controlling. That statute reads:

> In any civil action under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515] in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—
>
> (1) Applies to the same merchandise that was the subject of the protest; and
>
> (2) Is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 [19 U.S.C. § 1514] that was contested in the protest.

As may be noted above, two conditions must exist for assertion of a new ground in support of the civil action in this case: (1) the new ground must apply to the same merchandise that was the subject of the protest; and (2) the new ground must be *"related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest"* (Emphasis added). Under section 514, appraisement (section 514(a)(1)) and classification (section 514(a)(2)) are distinct categories of administrative decision. Clearly, then, plaintiff's motion to amend the summons must be denied inasmuch as the classification decision which would be contested by the proposed amendment of the summons is categorically unrelated to the administrative decision that was contested in the protest, *viz.*, appraisement.[4] *See* under predecessor statute 28 U.S.C. § 2632(d): *Mobilite, Inc.* v. *United States,* 70 Cust. Ct. 359, C.R.D. 73-11, 358 F. Supp. 267 (1973); and *C. L. Hutchins & Co.* v. *United States,* 67 Cust. Ct. 60, C.D. 4252, 331 F. Supp. 318, *motion to modify denied,* 67 Cust. Ct. 354, C.D. 4297, 334 F. Supp. 188 (1971).

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[3] An examination of the protest form reveals that plaintiff did not check the box referring to classification, rate on amount of duty, nor did plaintiff fill out the blank space under that box with any claim or explanation.

[4] Plaintiff asserts the protest reflects that the tubing bonnets covered by the entry were improperly classified. However, I find no suggestion in the protest that the merchandise was improperly classified. Additionally, plaintiff's assertion (which defendant disputes) that Customs has agreed the classification of the subject merchandise was improper is irrelevant to the claim properly before the Court.

Simply put, since the correctiveness of Customs' classification was not raised at the administrative level by protest, I am constrained to find that this Court is precluded from initially reviewing the classification. To hold otherwise, would vitiate the protest procedure and the reason for administrative review.

For the foregoing reasons, plaintiff's motion to amend the summons is denied.

F. W. MYERS & CO., INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 80-5-00828

Before BOE, *Judge.*

Memorandum Opinion and Order Denying Motion for Rehearing

[Motion of defendant for rehearing and evidentiary hearing denied.]

(Dated December 27, 1983)

The defendant having filed a motion requesting a rehearing and the vacation of the prior order of this court, entered on November 3, 1983 in the above action, and further requesting an order providing for an evidentiary hearing on plaintiff's claim of non-receipt of timely notice of denial of Protest No. 3801-9-000272 after discovery proceedings with respect thereto have been commenced and completed by the defendant, and

The court having considered the memoranda submitted by defendant in support of the aforesaid motion as well as the response of the plaintiff thereto, and

It appearing to the satisfaction of the court:

(1) That the defendant has presented no additional facts nor any new principles of law which have not been fully considered by this court in its prior determination of the instant action. That, in fact, the defendant is now seeking to reopen this proceeding by attempting to ascertain the existence of relevant facts through untimely discovery proceedings.

(2) That the defendant by presenting to this court in the form of affidavits the facts allegedly relating to its cross-motion to dismiss has foregone the opportunity to present these and/or additional facts in some other manner, particularly by an evidentiary hearing which it now seeks after the accumulation of further evidence through discovery. *See Bowman* v. *Curt G. Joa, Inc.,* 361 F.2d 706 (4th Cir. 1966); *Canvas Fabricators, Inc.* v. *William E. Hooper & Sons Co.,* 199 F.2d 485 (7th Cir. 1952).

Now therefore, it is hereby

ORDERED that defendant's motion for rehearing and request for an evidentiary hearing after discovery is denied.

OLD REPUBLIC INSURANCE COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83-8-01115

Before BERNARD NEWMAN, *Judge.*

Memorandum and Order on Motion To Amend Summons

[Plaintiff's motion denied without prejudice.]

(Dated December 28, 1983)

Sandler & Travis, P.A. (Mark D. Crames, Esq., of counsel) for plaintiff.

Richard K. Willard, Acting Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Kenneth N. Wolf, Esq.*, for defendant.

BERNARD NEWMAN, *Judge:* Before the Court is a motion under Rule 15 of the Rules of the Court of International Trade by Washington International Insurance Company (Washington) to amend the summons filed in this case by Old Republic Insurance Company (Republic).[1] Washington seeks to be substituted as plaintiff, alleging it is the real party in interest and that the action was "inadvertently" filed in the name of Republic.

Defendant opposes the proposed amendment on the ground that Washington has failed at this time to establish any basis for the substitution of plaintiffs, and requests that the motion to amend be denied without prejudice to renewal upon a proper showing.

I agree with defendant that Washington's motion should be denied, but without prejudice to renewal.

The papers presently before the Court fail to disclose Republic's connection with the cause of action, if any, or Washington's standing under 28 U.S.C. § 2631 as a proper party plaintiff. Section 2631 provides, *inter alia,* that a civil action may be commenced by the person who filed the protest pursuant to 19 U.S.C. § 1514 or by a surety on the transaction which is the subject of the protest. Washington, however, has not asserted that it either filed the protest or was the surety on the transaction which was the subject of the protest. Moreover, Washington has made no effort to explain the circumstances under which this action was "inadvertently" filed in the name of Republic. Indeed, for all that is presently before the Court, Republic may have been a total stranger to the import transaction. Consequently, Washington's application utterly fails to demonstrate any basis for the proposed substitution.

For the foregoing reasons, it is hereby ORDERED that Washington's motion to amend the summons to substitute itself for Republic as plaintiff in this action is denied, but without prejudice to renewal upon a showing of a proper factual or legal basis to support its motion.

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[1] See Rule 3(d) of the Rules of the Court of International Trade.

ABSTRACTS OF COURT OF INTERNATIONAL TRADE DECISIONS

The following abstracts of decisions of the U.S. Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned.

ABSTRACTED PROTEST DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/201	Rao, J. July 5, 1983	Semperit of America, Inc.	79-6-01021, etc.	Item 359.50 25¢ per lb. + 30% Item 359.10 15%	Item 359.60 8.5%	Agreed statement of facts	Baltimore Cloth inserted rubber sheeting
P83/202	Landis, J. July 5, 1983	Coleco Industries, Inc.	80-9-01518	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Ogdensburg Ice beds for power jet hockey
P83/203	Landis, J. July 5, 1983	Lloyd's Electronics Int'l.	80-10-01582	Item 678.50 5% Item 720.02 37¢ each	Item 678.50 5%	Agreed statement of facts	New York Solid-state digital AM/FM timekeeping radio/8-track player combinations with LED displays
P83/204	Boe, J. July 5, 1983	North American Foreign Trading Corp.	81-2-00136	Item 716.14 75¢ each	Item 688.36 5.5%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York LCD watch modules 823T and 823

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/205	Boe, J. July 5, 1983	North American Foreign Trading Corp.	81-11-01572	Item 676.20 4.8% Item 715.15 Duty on "movements" under item 716.18 at rate of 67¢ each Item 715.05 Duty on "movements" under 716.18 at 67¢ each	Item 676.20 4.8% (merchandise marked "A") Item 688.36 5.3% (merchandise marked "B")	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York LCD clock/calculators (merchandise marked "A") LCD watches (merchandise marked "B")
P83/206	Boe, J. July 5, 1983	North American Foreign Trading Corp.	82-4-00532	Item 716.14 75¢ each	Item 688.36 5.5%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York LCD watch modules 823T and 823
P83/207	Boe, J. July 5, 1983	RCA Corp.	81-8-01115	Merchandise classified articles with constructively separated clock movements classified under item 720.18 at $1.125 each plus 16%; VCR classified under item 685.40 at 5.5%	Item 685.40 5.5%	Texas Instruments, Inc. v. U.S., 1 CIT 236, aff'd, 69 CCPA 136 (1982)	Los Angeles Video cassette recorders which contain digital clock/timers; entirety with article in which incorporated
P83/208	Landis, J. July 14, 1983	E. Gluck Corp.	81-12-01777	Items 715.05 (716.14/716.18) (modules), 720.24 or 720.28 (cases) and 740.85 (bands) Various rates	Item 688.36 (merchandise marked "A") 5.5%, 5.3%, 5.1% or 4.9% Item 656.25 (merchandise marked "B" plated with gold) 25%, 23.1%, 21.3% or 19.4% Item 657.35 (merchandise marked "B" brass c.v.) .6¢ per lb. + 7.5%, 7.4%, 7.0% or 6.7%	Agreed statement of facts	New York Electronic LCD watches

					Item 657.20 (merchandise marked "B" steel c.v.) 9.5%, 9.0%, 8.6% or 8.1% Item 656.20 (merchandise marked "B" coated or plated with palladium) 16%, 14.9%, 13.9% or 12.8%		
P83/209	Landis, J. July 14, 1983	E. Gluck Corp.	82-1-00113	Items 715.05 (716.14/716.18) (modules), 720.24 or 720.28 (cases) and 740.35 (bands) Various rates	Item 688.36 (merchandise marked "A") 5.5%, 5.3%, 5.1% or 4.9% Item 656.25 (merchandise marked "B" plated with gold) 25%, 23.1%, 21.3% or 19.4% Item 657.35 (merchandise marked "B" brass c.v.) .6¢ per lb. + 7.5%, 7.4%, 7.0% or 6.7% Item 657.20 (merchandise marked "B" steel) 9.5%, 9.0%, 8.6% or 8.1% Item 656.20 (merchandise marked "B" coated or plated with palladium) 16%, 14.9%, 13.9% or 12.8%	Agreed statement of facts	New York Electronic LCD watches
P83/210	Boe, J. July 14, 1983	E. Gluck Corp.	81-1-00068	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold)	Agreed statement of facts	New York Electronic LCD watches

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7.0% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9.0%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/211	Boe, J. July 14, 1983	E. Gluck Corp.	81-10-01405	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7.0% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9.0%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches

P83/212	Boe, J. July 14, 1983	E. Gluck Corp.	81-10-01448	Item 715.05 (modules) Various rates Item 720.24 or 720.28 (cases) Various rates Item 740.35 (bands) Various rates	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7.0% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9.0%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches
P83/213	Re, C.J. July 18, 1983	Electronic Arrays, Inc.	80-2-00328	Item 716.05 Not stated Item 720.75 Not stated	Item 688.40 5.5% Item 687.60 6%	Agreed statement of facts	San Francisco Watch modules and watch integrated circuits
P83/214	Re, C.J. July 18, 1983	Electronic Arrays, Inc.	81-10-01778	Item 716.05 Not stated Item 720.75 Not stated	Item 688.40 5.5% Item 687.60 6%	Agreed statement of facts	San Francisco Watch modules and watch integrated circuits
P83/215	Re, C.J. July 18, 1983	Litronix, Inc.	79-7-01177	Item 716.05 Not stated Item 720.40 Not stated	Item 688.40 5.5% Item 685.70 4%	Agreed statement of facts	San Francisco Watch modules and watch displays
P83/216	Landis, J. July 18, 1983	Arthur J. Fritz & Co.	81-11-01569	Item 184.75 8% or 7.5% Item 184.85 5.2% or 3%	Item 187.47 Free of duty	Norman G. Jensen v. U.S., 2 CIT 198 (1981)	Blaine (Seattle) Grain screenings pellets

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/217	Landis, J. July 18, 1983	Arthur J. Humphreys, Inc.	81-10-01370	Item 184.75 8% or 7.5% Item 184.85 5.2% or 3%	Item 187.47 Free of duty	Norman G. Jensen v. U.S., 2 CIT 198 (1981)	Blaine (Seattle) Grain screenings pellets
P83/218	Landis, J. July 18, 1983	Exquisite Form Industries, Inc.	82-2-00227	Item 376.24 32%	Item 376.28 18%	Agreed statement of facts	New York Body supporting garments
P83/219	Landis, J. July 18, 1983	Signetics Corp.	78-6-01007	Item 697.60 6%	Item 807.00 With an allowance in duty based upon full value of merchandise less cost or value of prefabricated die of U.S. origin	U.S. v. Texas Instruments, Inc. (C.A.D. 1178)	San Francisco American goods returned; integrated circuits which consist of U.S. fabricated components
P83/220	Landis, J. July 18, 1983	Sterncomco, Inc.	81-10-01371	Item 184.75 8% or 7.5% Item 184.85 5.2% or 3%	Item 187.47 Free of duty	Norman G. Jensen v. U.S., 2 CIT 198 (1981)	Lynden (Seattle) Grain screenings pellets
P83/221	Re, C.J. July 25, 1983	Chrysler Corp.	71-5-00099	Item 696.15 12%, 10.5%, 9.5%, 8%, 7% or 6%	Item 680.45 8%,7%, or 6% For duty purposes, the value of the outboard drives shown on commercial invoices for entry 1033608 of 4/2/68 shall be $243.00 each	Eaton Manufacturing Co. v. U.S. (C.D. 4571)	New York Outboard drives
P83/222	Re, C.J. July 25, 1983	Electronic Arrays, Inc.	80-9-01425	Item 716.05 Not stated Item 720.75 Not stated	Item 688.40 5.5% Item 687.60 6%	Judgment on the pleadings	San Francisco Watch modules and watch integrated circuits
P83/223	Re, C.J. July 25, 1983	Scheer & Spring, Ltd.	79-8-01348, etc.	Item 702.47 Column two rates of duty	Item 702.47 $1.02 per doz. + 5%	Agreed statement of facts	New York Ladies' straw hats

P83/224	Re, C.J. July 25, 1983	Standard Sales, Inc.	78-9-01555	Item 705.35 15%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	Los Angeles Style No. 635 men's cowhide grain leather ski gloves
P83/225	Re, C.J. July 25, 1983	United Tire and Rubber Co.	81-8-01113, etc.	Item 772.51 4%	Item 772.50 Free of duty	Agreed statement of facts	Buffalo Pneumatic tires of rubber or plastic for tractors
P83/226	Newman, J. July 25, 1983	Federal Pacific Electric Co.	79-9-01471	Item 682.05 12.5%	Item 682.07 6%	Summary judgment	Buffalo Ground fault sensors or sensing transformers
P83/227	Boe, J. July 25, 1983	E. Gluck Corp.	81-1-00084	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/228	Boe, J. July 26, 1983	E. Gluck Corp.	81-1-00036	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/229	Boe, J. July 26, 1983	E. Gluck Corp.	81-4-00451	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, or 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting or modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

P83/230	Boe, J. July 26, 1983	E. Gluck Corp.	81-8-01099	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.8%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.8% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/231	Boe, J. July 26, 1983	E. Gluck Corp.	81-9-01235	Item 715.05 Various rates (modules) Item 720.24 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.8%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1% or 23.1% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/232	Boe, J. July 26, 1983	E. Gluck Corp.	81-10-01447	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 23.1% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/233	Boe, J. July 27, 1983	Magnavox Consumer Electronic Co.	81-5-00623	Item 716.18, 720.02, 720.14 and 720.16 Various rates	Item 685.40 5.5%, or 5.3% Merchandise assessed on basis of export value equal to sum of appraised values of radio receivers and tape recorders and timepiece portions	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981) aff'd, 69 CCPA 136 (1982)	Los Angeles AM/FM clock radios

P83/234	Boe, J. July 27, 1983	Magnavox Consumer Electronic Co.	81-12-01658, etc.	Item 720.14, 720.16 and 720.18 Various rates	Item 685.24 9.9% or 9.3% Merchandise assessed on basis of export value equal to sum of appraised values of radio receivers and timepiece portions	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981) aff'd, 69 CCPA 136 (1982)	Los Angeles AM/FM clock radios
P83/235	Re, C.J. July 29, 1983	Corning Glass Works	82-9-01265	Item 425.04 6%	Item 437.76 Free of duty	Agreed statement of facts	New York Fractions of human blood
P83/236	Re, C.J. July 29, 1983	Firestone Canada, Inc.	82-1-00001	Item 772.51 4%(merchandise marked "A") Item 772.60 4.7% (merchandise marked "B")	Item 772.50 Free of duty (merchandise marked "A") Item 772.59 Free of duty (merchandise marked "B")	Agreed statement of facts	Detroit Pneumatic tires and tire tubes
P83/237	Re, C.J. July 29, 1983	The Firestone Tire & Rubber Co.	81-10-01468	Item 772.51 4% (merchandise marked "A") Item 772.60 4.7% (merchandise marked "B")	Item 772.50 Free of duty (merchandise marked "A") Item 772.59 Free of duty (merchandise marked "B")	Agreed statement of facts	Detroit Pneumatic tires and tire tubes
P83/238	Re, C.J. July 29, 1983	The Firestone Tire & Rubber Co.	82-1-00002	Item 772.51 4% (merchandise marked "A") Item 772.60 4.7% (merchandise marked "B")	Item 772.50 Free of duty (merchandise marked "A") Item 772.59 Free of duty (merchandise marked "B")	Agreed statement of facts	Detroit Pneumatic tires and tire tubes

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/239	Re, C.J. July 29, 1983	The Firestone Tire & Rubber Co.	82-2-00196	Item 772.51 4% (merchandise marked "A") Item 772.60 4.7% (merchandise marked "B")	Item 772.50 Free of duty (merchandise marked "A") Item 772.59 Free of duty (merchandise marked "B")	Agreed statement of facts	Detroit Pneumatic tires and tire tubes
P83/240	Watson, J. July 29, 1983	Harper-Wyman Co.	77-10-04538	Item 685.90 8.5%	Item 684.30 4%	Harper Wyman Co. v. U.S., 1 CIT 108 (1981)	Brownsville (Laredo) Electric thermostats
P83/241	Boe, J. July 29, 1983	E. Gluck Corp.	81-10-01404	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.35 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3%, 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/242	Re, C.J. August 2, 1983	F. W. Myers & Co.	78-3-00887	Item 608.05 0.3¢ per lb.	Item 608.02 Free of duty	F. W. Myers & Co. v. U.S. (C.D. 4635)	Detroit; Ogdensburg (Champlain-Rouses Point) Sponge iron powder

P83/243	Boe, J. August 2, 1983	Alexander G. Arroyos	76-1-00092	Item 609.03 8.5%	Item 642.93 .02¢ per lb.	Doherty-Barrow of Texas, Inc. v. U.S., 3 CIT 228 (1982)	Houston Steel cotton ties
P83/244	Boe, J. August 2, 1983	Syncroquartz (Former name: Microma, Inc.) and Intel Corp.	81-3-00335, etc.	Item 720.75 22.5%	Item 687.60 6% (merchandise marked "A") Item 688.36 5.5% (merchandise marked "B")	U.S. v. Texas Instruments, Inc., C.A.D. 1244 (1980) (merchandise marked "A") U.S. v. Texas Instruments, Inc., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982) (merchandise marked "B")	San Francisco Integrated circuit devices (merchandise marked "A") watch modules (merchandise marked "B")
P83/245	Boe, J. August 2, 1983	Westinghouse Trading Corp.	80-10-01647	Item 536.11 22.5%	Item 535.14 15%	Westinghouse Trading Co. v. U.S. (C.D. 4817)	New York Translucent alumina tubes
P83/246	Re, C.J. August 12, 1983	D'Vincci Watch Co., Inc.	83-1-00027	Not stated	Item 688.36 5.1%	Judgment on the pleadings	San Francisco Watch module bracelets
P83/247	Re, C.J. August 12, 1983	G.M. Miller & Co., Int'l	83-3-00402	Not stated	Item 688.36 5.1%	Judgment on the pleadings	San Francisco LCD watch modules
P83/248	Re, C.J. August 16, 1983	Chrysler Corp.	67/46813, etc.	Item 696.15 12%, 10.5%, 9.5%, 8%, 7% or 6%	Item 680.45 9%, 8%, 7%, 6%, 5%, or 4% Item 680.45 9%, 8%, 7%, 6%, 5%, or 4% ("out-drive") Item 696.15 12%, 10.5%, 9.5%, 8%, 7% or 6% ("transom shields") Item 664.10 10.5%, 9%, 8%, 7%, 6%, 5% ("electrical lift")	Easton Manufacturing Co. v. U.S. (C.D. 4207)	New York Outboard drives

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/249	Re, C.J. August 16, 1983	Sara International Inc.	81-10-01707	Item 807.00/382.8137 Appraised on basis of constructed value; entered dutiable values less cost or value of U.S. products, excluding components subjected to buttonholing or similar operations	Item 807.00/382.8137 Dutiable on basis of constructed value; represented by entered values less cost or value or U.S. products including components subjected to buttonholing or similar operations	Agreed statement of facts	Miami Ladies' blouses
P83/250	Re, C.J. August 17, 1983	A.N. Deringer, Inc.	80-7-01027	Item 274.75 6¢ per lb.	Item 274.75 Free of duty	Judgment on the pleadings	New York Printed material consisting of non-post-card portion of magazine inserts
P83/251	Re, C.J. August 19, 1983	Electronic Arrays, Inc	81-2-00186	Not stated	Item 688.36 5.5% (watch modules) Item 687.60 6% (watch or clock integrated circuits)	Judgment on the pleadings	San Francisco Watch modules and watch assemblies
P83/252	Re, C.J. August 19, 1983	Electronic Arrays, Inc	81-10-01366	Not stated	Item 688.36 5.5% (watch modules) Item 687.60 6% (watch and clock integrated circuits)	Judgment on the pleadings	San Francisco Watch modules and watch assemblies

P83/253	Boe, J August 19, 1983	Litronix, Inc	78-12-02093	Item 716.15 or 716.05 75¢ each (watch modules) Item 720.40 22.75% (watch displays) Item 72075 22.5% (watch integrated circuits)	Item 688.36 5.5% (watch modules) Item 685.70 4% (watch displays) Item 687.60 6% (watch integrated circuits)	United States v. Texas Instruments, Inc., 69 CCPA 136 (1982) (watch modules) United States v. Texas Instruments, Inc., C.A.D. 1243 (watch displays) United States v. Texas Instruments, Inc. C.A.D. 1244 (watch integrated circuits)	San Francisco Watch modules and watch displays
P83/254	Re, C.J. August 22, 1983	D'Vinoci Watch Co., Inc.	83-2-00230	Item 740.30 or 740.38 Not stated	Item 688.36 5.1% or 4.0%	Agreed statement of facts	San Francisco Watch module bracelets
P83/255	Re, C.J. August 24, 1983	Petrie Stores Corp.	81-10-01473	Item 382.04 42.5%	Item 382.78 25¢ per lb. + 32.5%	Agreed statement of facts	New York Ladies' acrylic sweaters, style No. 1802
P83/256	Re, C.J. August 30, 1983	Coast Trading Co.	81-10-01491, etc.	Item 184.75 8% or 7.5% 5.2% or 3%	Item 187.47 Free of duty	Norman G. Jenson v. U.S., 1 CIT 198 (1981)	Blaine (Seattle) Pelleted screening
P83/257	Re, C.J. August 30, 1983	E. Gluck Corp.	81-12-01694	Item 715.05 (716.14/716.18) Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/258	Re, C.J. August 30, 1983	Hanover Glove Co.	82-2-00191	Item 705.35 15%	Item A735.06 Free of duty pursuant to GSP	Agreed statement of facts	Baltimore Ski gloves
P83/259	Re, C.J. August 30, 1983	Nippon Kogaku (USA), Inc.	81-9-01238	Not stated	Item 708.45 15% (merchandised marked "A") Item 708.47 15% (merchandised marked "B")	Agreed statement of facts	New York Adult sets of subvision aids and frames and mountings for eyeglasses
P83/260	Re, C.J. August 30, 1983	North American Foreign Trading Corp.	81-9-00111	Item 715.15 Duty assessed under item 716.15 at rate of 75¢ each on the "movements" Duty assessed on cases under 720.34 at rate of 13.5%	Item 688.36 5.5%	Agreed statement of facts	New York LCD clocks

P83/261	Re, C.J. August 30, 1983	Western Farmers Association	81-10-01490	Item 184.75 8% or 7.5% Item 184.85 5.2% or 3%	Item 187.47 Free of duty	Norman G. Jensen v. U.S., 1 CIT 198 (1981)	Lynden (Seattle) Pelleted screenings
P83/262	Re, C.J. September 6, 1983	E. Gluck Corp.	81-11-01595	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.35 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5.%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of fact	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/263	Re, C.J. September 6, 1983	U.S. JVC Corp.	81-9-01209	Not stated	Item 685.40 5.5% or 5.3%	Judgment on the pleadings	Los Angeles Video cassette recorders; entirety with incorporated timer devices
P83/264	Re, C.J. September 6, 1983	U.S. JVC Corp.	82-3-00433	Not stated	Item 685.40 5.1%	Judgment on the pleadings	Chicago Video cassette recorders; entirety with incorporated timer devices
P83/265	Ford, J. September 6, 1983	F.W. Myers & Co.	82-8-01139	Item 680.22 11%	Item 666.00 Free of duty	Agreed statement of facts	Buffalo Automatic livestock waterers
P83/266	Ford, J. September 8, 1983	Uniroyal, Inc.	83-1-00083	Item 680.12 5.5%	Item 678.10 Free of duty	Converse Rubber v. U.S. (C.D. 4374)	Bridgeport (Boston) Shoe machinery molds

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/267	Re, C.J. September 6, 1983	Allison Corp.	83-4-00522	Item 389.62 15% + 25¢ per lb.	Item 389.70 10%	Agreed statement of facts	New York "Lashing cable" style Nos. 9844, 9330, 9343 and 9306
P83/268	Re, C.J. September 6, 1983	J.C. Penney Purchasing Corp.	81-4-00464	Item A737.95 17.5%	Item A737.15 Free of duty (vehicle) Item A685.60 Free of duty (transmitter)	Agreed statement of facts	Savannah Radio controlled white Porsche and Radio controlled black Porsche
P83/269	Watson, J. September 13, 1983	Mast Industries, Inc.	80-1-00061, etc.	Under item 807.00 at rate of duty applicable to items 382.04, 382.33, 382.71, 382.78, 382.81, with an allowance given to cost or value of some of the fabric components, the product of U.S.; no allowance made for fabric components, the product of U.S., subjected to buttonhole and/or slit operations during assembly of imported garments	Buttonhole and pocket slit components are properly subject to item 807.00 duty allowance	U.S. v. Mast Industries, No. 81-18 (CCPA 12/30/81)	Miami American goods returned; garments consisting in part of fabric components of U.S. origin subjected to buttonhole and/or slit operations during foreign assembly of imported garments
P83/270	Boe, J. September 13, 1983	A & A International Inc.	81-12-01733, etc.	Items 716.16, 716.18, 720.16, etc. Various rates (watch or clock movements) Item 740.35 32.4% or 29.8%	Item 688.36 5.3% or 5.1% (merchandise marked "A") Item 688.36 5.3% or 5.1% (merchandise marked "B")	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981) aff'd, 69 CCPA 136 (1982)	Boston; Charleston; Columbus Solid state timing devices; entirety

P83/271	Boe, J. September 13, 1983	Craig Corp.	81-1-00106	Item 720.14 37.5¢ each + 16% Item 720.16 75¢ each + 16%	Item 678.50 5% Item 685.21 10.4%	U.S. v. Texas Instruments, No. 81-23 3/25/83	Los Angeles Integrated circuits
P83/272	Boe, J. September 13, 1983	E. Gluck Corp.	81-1-00035	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/273	Boe, J. September 13, 1983	E. Gluck Corp.	81-1-00067	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/274	Boe, J. September 13, 1983	E. Gluck Corp.	81-5-00633	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

P83/275	Boe, J. September 13, 1983	E. Gluck Corp.	81-8-01098	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/276	Boe, J. September 13, 1983	Fortune Star Products Corp.	81-7-00968	Item 716.18 67¢ each	Item 685.24 9.9%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981) aff'd, 69 CCPA 136 (1982)	New York LCD movement of certain LCD travel radios
P83/277	Boe, J. September 13, 1983	Litronix, Inc.	81-9-01420	Item 716.15 Various rates (merchandise marked "A") Item 720.40 1¢ each + 19.1% (merchandise marked "B")	Item 688.36 5.5% Item 685.70 4%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982) (merchandise marked "A") U.S. v. Texas Instruments, Inc., C.A.D. 1243 (merchandise marked "B")	San Francisco Watch modules (merchandise marked "A"); watch displays (merchandise marked "B")

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/278	Boe, J. September 13, 1983	Magnavox Consumer Electronic Co.	81-6-00745	Merchandise classified as combination articles with constructively separated clock movements classified under item 720.14 (merchandise marked "A") and item 720.18 (merchandise marked "B") and assessed with duty at various rates	Item 685.24 9.9% (merchandise marked "A") Item 685.40 5.5% (merchandise marked "B") Dutiable upon basis of export value; said value equal to sum of appraised values of radio receivers, tape recorders, and timepiece portions	Texas Instruments, Inc. v. U.S., 1 CIT 236, aff'd, 69 CCPA 136 (1982)	Los Angeles Solid state timing devices; entirety with article in which incorporated (merchandise marked "A" and "B")
P83/279	Boe, J. September 13, 1983	Sears, Roebuck and Co.	81-9-01270	Item 720.1605 14.8%	Item 676.20 4.8%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	New Orleans "Time of day" portion of calculators
P83/280	Boe, J. September 13, 1983	Sears, Roebuck and Co.	81-9-01271	Item 720.14 14.8%	Item 1684.25 4%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	Seattle "Time of day" portion of microwave ovens
P83/281	Boe, J. September 13, 1983	Siliconix, Inc.	80-9-01419	Item 720.75 22.5%	Item 687.60 6%	U.S. v. Texas Instruments, C.A.D. 1244	San Francisco Watch assemblies

P83/282	Boe, J. September 13, 1983	White Swan Uniforms, Inc.	80-12-00095	Items 382.04, 382.78 or 382.81 without allowance under item 807.00	Item 807.00 and 382.04, 382.78 or 382.81 Various rates with cost or value of components deducted by Customs Service on liquidation and less cost or value, as set forth on "Constructed Value Statements" and print-out of "tucked" fabric values of "tucked" and/or "buttonholed" textile fabric panels of imported garments	White Swan Uniforms, Inc. v. U.S., Abs. P82/137 (1982)	Miami Women's wearing apparel
P83/283	Boe, J. September 13, 1983	White Swan Uniforms, Inc.	80-12-00096	Items 382.04, 382.78 or 382.81 without allowance under item 807.00	Item 807.00 and 382.04, 382.78 or 382.81 Various rates with cost or value of components deducted by Customs Service on liquidation and less cost or value, as set forth on "Constructed Value Statements" and print-out of "tucked" fabric values of "tucked" and/or "buttonholed" textile fabric panels of imported garments	White Swan Uniforms, Inc. v. U.S., Abs. P82/137 (1982)	Miami Women's wearing apparel

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/284	Boe, J. September 13, 1983	White Swan Uniforms, Inc.	80-12-00097	Items 382.04, 382.78 or 382.81 without allowance under item 807.00	Item 807.00 and 382.04, 382.78 or 382.81 Various rates with cost or value of components deducted by Customs Service on liquidation and less cost or value, as set forth on "Constructed Value Statements" and print-out of "tucked" fabric values of "tucked" and/or "buttonholed" textile fabric panels of imported garments	White Swan Uniforms, Inc. v. U.S., Abs. P82/137 (1982)	Miami Women's wearing apparel
P83/285	Landis, J. September 20, 1983	Uniroyal, Inc.	81-9-01329	Items 680.12 or 680.15 5.5%	Item 680.11 Free of duty	Uniroyal, Inc. v. U.S.	New York Shoe machinery molds
P83/286	Neuman, J. September 21, 1983	Siemens Corp.	72-5-01098	Not stated	Item 685.90 8.5% refund of duties overpaid in the amount of $3,494.40	Agreed statement of facts	New York SVP-Tubes Entry No. 459692
P83/287 (See P84/304 for amendment)	Boe, J. September 21, 1983	Sears, Roebuck and Co.	81-10-01372	Various TSUS numbers as set forth on schedule attached to decision	Items 678.5052, 684.25, 684.30, 685.24, 685.4052, 687.58, and 687.60 Various rates	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	Los Angeles; Seattle "Time of day" portion of radio tape players, microwave ovens, video cassette recorders and analog clock radios
P83/288	Ford, J. September 22, 1983	Far Eastern Markets, Inc.	74-9-02350	Item 653.37 9.5%	Item 653.35 5%	Morris Friedman & Co. v. U.S. (C.D. 4570), aff'd, C.A.D. 1157	New York Brass candlesticks

P83/289	Boe, J. September 28, 1983	Craig Corp.	81-9-01174	Not stated	Item 678.50 5% or 4.8% Item 685.21 10.4%	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	Los Angeles Stereo cassette players with preset AM/FM/MPX receiver and digital clock, etc.; entireties
P83/290	Watson, J. September 29, 1983	Camel Manufacturing Co.	81-4-00398	Item 389.62 25¢ per lb. + 15%	Item A386.09 Free of duty	Agreed statement of facts	New Orleans (Knoxville) Tents
P83/291	Watson, J. September 29, 1983	Camel Manufacturing Co.	81-9-01275	Item 389.62 25¢ per lb. + 15%	Item A386.09 Free of duty	Agreed statement of facts	New Orleans (Knoxville) Tents
P83/292	Watson, J. September 29, 1983	Federal Transistor Co., Inc.	81-9-01266	Item 678.50 5% Item 720.16 16% + 75¢ each	Item 678.50 5%	Agreed statement of facts	Los Angeles AM/FM/TV band solid-state digital radio/8-track player combinations incorporating timedipping devices with LED displays
P83/293	Boe, J. September 29, 1983	General Time Corp.	78-12-02156, etc.	Item 720.02, 720.14 or 720.18 Various rates	Item 688.36 5.5% or 5.3%	Agreed statement of facts	Savannah LED clock modules with or without other words of description
P83/294	Boe, J. September 29, 1983	Lloyd's Electronics, Int'l.	81-6-00741	Item 720.34 13.5% Item 720.02 37¢ each	Item 688.36 5.5%	Agreed statement of facts	New York Solid-state digital time-keeping devices with LED displays
P83/295	Boe, J. September 29, 1983	Timex Corp.	82-8-00294	Not stated	Item 688.36 5.5% or 5.3%	Agreed statement of facts	Boston (Bridgeport) Solid-state electronic watches, clocks, or modules
P83/296	Ford, J. October 5, 1983	Berkshire Handkerchief Co.,	81-9-01294	Item 389.62 15% + 25¢ per lb.	Item 706.24 20%	J. E. Mamiye & Sons, Inc. v. U.S. (C.D. 4878)	New York Ladies' tote bags, handbags
P83/297	Ford, J. October 5, 1983	Solid State Products Corp.	80-7-01184	Item 389.62 15% + 25¢ per lb.	Item 706.24 20%	J. E. Mamiye & Sons, Inc. v. U.S. (C.D. 4878)	New York Ladies' tote bags

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/298	Ford, J. October 5, 1983	Solid State Products Corp.	82-3-00804	Item 389.62 15% + 25¢ per lb.	Item 706.24 20%	J. E. Mamiye & Sons, Inc. v. U.S. (C.D. 4878)	New York Ladies' tote bags
P83/299	Watson, J. October 5, 1983	Edison Brothers Stores Inc.	83-3-00364	Item 700.95 12.5%	Item 700.56 6%	Agreed statement of facts	Los Angeles Women's sandal footwear
P83/300	Watson, J. October 5, 1983	Olympia Sports Co., Inc.	81-6-00784	Item 705.85 15%	Item A735.05 Free of duty	Agreed statement of facts	New York Men's sports gloves and mittens
P83/301	Boe, J. October 5, 1983	A & A International Inc.	82-9-01347	Items 716.18, 720.02, 720.28, etc. Various rates ("watch or clock movements") Item 740.35 32.4% or 29.8% ("watchbands")	Item A676.20 Free of duty (merchandise marked"A") Item 688.36 5.3% (merchandise marked "B")	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Dallas/Ft. Worth Solid state timing devices
P83/302	Boe, J. October 5, 1983	Arrow Trading Co., Inc.	82-1-00010	Item 720.02 35¢ each (clock movements assembled, etc.) Item 715.29 34¢ each + 14.8%	Item 685.24 9.9% or 9.3%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	New York Clock portion of LCD clocks with radios
P83/303	Boe J. October 5, 1983	Bradley Time	82-11-01610	Item 716.18 38¢ each ("watch or clock movements") Item 720.18 9.8% + $.048 ("watch cases")	Item 688.36 5.3%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	New York Solid state electronic watch modules, solid state electronic watches, and other solid state electronic timing devices; entirety

P83/304 (amends abstract P83/287)	Boe, J. October 6, 1983	Sears, Roebuck and Co.	81-10-01372	Not stated	Items 678.5052, 687.60, 684.25, etc. Various rates	Agreed statement of facts	Los Angeles; Seattle "Time of day" portion of radio tape players, microwave ovens, video cassette recorders, and analog clock radios except models 2300 and 2301
P83/305	Boe, J. October 13, 1983	E. Gluck Corp.	81-2-00124	Item 715.05 (716.14/ 716.18) Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/306	Boe, J. October 13, 1983	E. Gluck Corp.	81-8-01081	Item 715.05 (716.14/ 716.18) Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 657.35 .6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/307	Re, C.J. October 17, 1983	A & A International Inc.	81-6-00797, etc.	Not stated	Item A685.70 Free of duty (Cat. No. 60-3003 and those Cat. Nos. 63-3001 and 63-3002 manufactured in Hong Kong) Item 685.70 Appropriate rate of duty (Cat. Nos. 63-3001 and 63-3002 manufactured in China)	A & A International, Inc. v. U.S., Slip Op. 83-42	Boston Metal detectors
P83/308	Re, C.J. October 17, 1983	A & A International Inc.	81-7-00888, etc.	Not stated	Item A685.70 Free of duty (Cat. No. 60-3003 and those Cat. Nos. 63-3001 and 63-3002 manufactured in Hong Kong)	A & A International, Inc. v. U.S., Slip Op. 83-42	Los Angeles Metal detectors

					Item 685.70 Appropriate rate of duty (Cat. Nos. 63-3001 and 63-3002 manufactured in China)		
P83/309	Landis, J. October 17, 1983	BASF Wyandotte Corp.	83-5-00663	Item 528.91 6.5%	Item 423.96 3.1%	Customs Service ruling, 4/19/83 (No. 070956)	New Orleans 03-10 catalyst
P83/310	Landis, J. October 17, 1983	Lloyd's Electronics Int'l.	80-10-01580	Item 676.20 5% Item 720.16 75¢ each +16%	Item 676.20 5% Item 688.40 5.5%	Agreed statement of facts	Los Angeles Solid-state digital calculator/timekeeping devices with LCD displays
P83/311	Newman, J. October 17, 1983	Sumitomo Corp. of America	80-9-01536	Item 609.86 8.5% + additional duties	Item 609.82 0.1¢ per lb. + 2% + additional duties	Philipp Overseas, Inc. v. U.S. (C.D. 4859), aff'd, C.A.D. 1263	New Orleans "Stainless steel angles, ASTM A276, T-304, hot rolled, annealed and pickled"
P83/312	Boe, J. October 17, 1983	Casio, Inc.	81-8-01106	Item 716.10 through 716.29 Various rates (merchandise marked "A", "B" (module), "C" (module) and "D" (module)) Items 720.20, 720.24, 720.28 Various rates (merchandise marked "B" (cases) and "D" (cases)) Item 676.20 Not stated (merchandise marked "C" (calculator) and "D" (calculator))	Item 688.36 5.5%, 5.3% or 5.1% (merchandise marked "A") Item 688.36 5.5%, 5.3% or 5.1% (merchandise marked "B") Item 676.20 5%, 4.8% or 4.7% (merchandise marked "C") Item 688.36 5.5%, 5.3% or 5.1% (merchandise marked "D")	U.S. v. Texas Instruments Inc., 69 CCPA 136 (1982)	New York; Los Angeles; Chicago Electronic watch modules, electronic watches, etc.

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/313 (See P83/376 for amendment)	Boe, J. October 17, 1983	Leisurecraft Products, Ltd.	81-8-01121	Item 715.05 (716.14/716.18) Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 (Merchandise marked "B" plated with gold) Item 657.35 (Merchandise marked "B" brass c.v.) Item 657.25 (Merchandise marked "B" steel c.v.) Various rates or free under GSP upon basis that GSP documents should be waived in accordance with 19 CFR 10.173	Agreed statement of facts	New York Electronic LCD watches, etc.
P83/314	Boe, J. October 17, 1983	Magnavox Consumer Electronics Co.	81-5-00570	Merchandise classified as combination articles with the constructively separated clock movements classified under items 715.15, 716.18, 720.02, 720.14 or 720.16 at various rates (merchandise marked "A")	Item 685.24 10.4% or 9.9% (merchandise marked "A") Item 685.40 5.5% (merchandise marked "B")	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Los Angeles AM/FM radios with clock (merchandise marked "A"); video cassette recorders (merchandise marked "B"); entireties

				Merchandise classified as combination articles with the constructively separated clock movements classified under items 715.68 or 720.18 at various rates (merchandise marked "B")			
P83/315	Boe, J. October 17, 1983	Magnavox Consumer Electronic Co.	81-7-00946, etc.	Merchandise classified as combination articles with the constructively separated clock movements classified under items 715.15, 716.18, 720.02, 720.14 or 720.16 at various rates (merchandise marked "A") Merchandise classified as combination articles with the constructively separated clock movements classified under items 715.68 or 720.18 at various rates (merchandise marked "B")	Item 685.24 10.4% or 9.9% (merchandise marked "A") Item 685.40 5.5% (merchandise marked "B")	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Los Angeles AM/FM radios with clock (merchandise marked "A"); video cassette recorders (merchandise marked "B"); entireties
P83/316	Boe, J. October 17, 1983	The Ratek Corp.	82-8-01106	Item 716.18 .59¢ each	Item 688.36 5.1%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Philadelphia L.E.D. modules
P83/317	Boe, J. October 18, 1983	Jet Sonic Corp.	82-2-00215	Item 716.10 or 716.18 Various rates (modules)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% Item 720.24 or 720.28 Various rates (cases) Item 740.30, 740.34 or 740.35 Various rates (chains) Item 774.55 or 791.54 Various rates (straps)	Texas Instruments Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/318	Boe, J. October 18, 1983	RCA Corp.	81-1-00073S	Item 685.20 5% Item 720.18 $1.125 each + 16% (digital clock/timer)	Item 685.20 5%	Texas Instruments Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Chicago Portable video cassette recorder tuner/timer modules which contain digital clock/timers
P83/319	Ford, J. October 20, 1983	A. D. Sutton & Sons, Inc.	77-12-04992	Item 706.60 20%	Item 774.60 8.5%	Agreed statement of facts	New York Tote bags
P83/320	Ford, J. October 20, 1983	Korea Manufacturing Corp.	81-10-01350, etc.	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982)	San Francisco Plastic film ribbons multi-strike, etc.
P83/321	Ford, J. October 20, 1983	Korea Manufacturing Corp.	82-4-00510	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982)	San Juan Plastic film ribbons multi-strike, etc.
P83/322	Ford, J. October 20, 1983	Majestic Penn State, Inc.	80-7-01191	Item 386.09 25%	Item 706.23 6.5%	J. E. Mamiye & Sons, Inc. v. U.S. (C.D. 4878), aff'd, No. 81-6, 7/23/82	Philadelphia Ladies' tote bags
P83/323	Re, J. October 24, 1983	A & A International Inc.	81-11-01559, etc.	Not stated	Item A685.70 Free of duty (Cat. No. 60-3003 and Cat. Nos. 63-3001 and 63-3002 manufactured in Hong Kong) Item 685.70 Various rates (Cat. Nos. 63-3001 and 63-3002 manufactured in China)	A & A International, Inc. v. U.S., Slip Op. 83-42, 5/10/83	Portland; Charleston; Boston; Dallas/Ft. Worth; Columbus; Seattle Metal detectors
P83/324	Landis, J. October 24, 1983	F. W. Myers & Co., Inc.	80-10-01628	Item 629.6500 9%	Items 629.60/911.12 Free of duty	Agreed statement of facts	Ogdensburg Zirconium

P83/325	Landis, J. October 24, 1983	Nadel Trading Corp.	78-7-01329, etc.	Item 774.60 8.5%	Item A772.15 Free of duty pursuant to GSP	Agreed statement of facts	New York Plastic noddable flowers and vase
P83/326	Landis, J. October 24, 1983	Nadel Trading Corp.	83-4-00546	Item 774.45 8.5%	Item A772.15 Free of duty pursuant to GSP	Agreed statement of facts	New York Plastic noddable flowers and vase
P83/327	Landis, J. October 24, 1983	Panasonic Co.	82-1-00114, etc.	Not stated	Items 676.20, 684.30 684.25, 685.40, etc. Various rates	Judgment on the pleadings	Tacoma (Seattle); Seattle; New York Pocket calculator with timer device, etc.
P83/328	Ford, J. October 25, 1983	Korea Manufacturing Corp.	79-11-01720	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	San Francisco Plastic film ribbons multi-strike, etc.
P83/329	Ford, J. October 25, 1983	Korea Manufacturing Corp.	80-10-01699	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	New York Plastic film ribbons multi-strike, etc.
P83/330	Ford, J. October 25, 1983	Korea Manufacturing Corp.	81-8-01000, etc.	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	San Juan Plastic film ribbons multi-strike, etc.
P83/331	Ford, J. October 25, 1983	Korea Manufacturing Corp.	81-9-01210, etc.	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	Boston Plastic film ribbons multi-strike, etc.
P83/332	Ford, J. October 25, 1983	Korea Manufacturing Corp.	81-9-01214, etc.	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	Boston Plastic film ribbons multi-strike, etc.
P83/333	Ford, J. October 25, 1983	Korea Manufacturing Corp.	82-11-01507	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 82-33, 7/23/83	San Juan Plastic film ribbons multi-strike, etc.

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/334	Ford, J. October 25, 1983	Korea Manufacturing Corp.	82-12-01775	Not stated	Item 676.52 Various rates	Korea Manufacturing Corp. v. U.S., 3 CIT 178 (1982), aff'd, No. 83-33, 7/28/83	Charleston Plastic film ribbons multi-strike, etc.
P83/335	Boe, J. October 25, 1983	Leisurecraft Products, Ltd.	81-5-00615	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3%, 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. +7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/336	Ford, J. October 27, 1983	Robert D. Lewis Corp.	82-1-00082	Item 389.62 15%+25¢ per lb. Dutiable on basis of export value at various invoiced unit prices plus 50%, packed	Item 706.24 20% Dutiable on basis of export value at invoiced unit values, net packed	U.S. v. J. E. Mamiye & Sons, No. 81-6 aff'd 11/19/81	Newark (New York) Styles 1712, 6433, 6433P, 1066, 1132 and 1133
P83/337	Landis, J. October 27, 1983	Matsushita Industrial Co.	82-6-00862	Item 685.90 Not stated	Item 685.19 Not stated	Judgment on the pleadings	Chicago Not stated

P83/338	Boe, J. October 27, 1983	Leisurecraft Products, Ltd.	81-3-00266	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3%, 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb.+7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties
P83/339	Rao, J. November 4, 1983	Audiovox Corp.	82-7-00967	Item 685.29 6%	Item 685.29 Free of duty pursuant to GSP	Agreed statement of facts	New York Converters
P83/340	Rao, J. November 4, 1983	Instyle Imports Ltd.	82-8-01110	Item 382.04 42.5%	Item 382.81 25¢ per lb. + 27.5%	Agreed statement of facts	New York Ladies' raincoats "style No. 2473"
P83/341	Rao, J. November 4, 1983	Matos, Felix L.	80-10-01675	Item 640.10 5%	Item 640.10 Free of duty pursuant to GSP	Agreed statement of facts	San Juan Metal pressure containers

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/342	Landis, J. November 4, 1983	Cleveland Street Togs	80-6-00987, etc.	Under item 807.00 at rate of duty applicable to item 382.33, 382.81 or 380.84 with allowance given to cost or value of some of the fabric components, the product of the U.S. and utilized in assembling the imported merchandise; no allowance made for fabric components, the product of U.S. subjected to buttonhole and/or pocket slit operations during assembly of imported garments	Components subjected to buttonhole and/or pocket slit operations during the assembly process are properly classifiable under item 807.00 and entitled to duty allowance	U.S. v. Mast Industries, Inc. No. 81-18 aff'd 12/30/81	New York American goods returned; articles of wearing apparel assembled abroad in part of U.S. fabricated components
P83/343	Landis, J. November 4, 1983	North American Foreign Trading Corp.	82-4-00537	Item 676.20 4.7% (calculator portion) Item 716.18 59¢ each	Item 676.20 4.7%	Agreed statement of facts	New York LCD travel alarm with calculator models B6930 and B6931

P83/344	Landis, J. November 4, 1983	Sara International Inc.	81-7-00650	Item 807.00/382.8137 Dutiable values less cost or value of U.S. products, excluding components subjected to buttonholing or similar operations Merchandise appraised on basis of constructed value	Item 807.00/382.8137 Dutiable values represented by entered values, $19.2262/dozen (style No. 4612), $15.5649/dozen (style No. 4512), $18.0047/dozen (style No. 4613), $15.6070/dozen (style No. 4514), $17.3385/dozen (style No. 4511) less cost or value of U.S. products, including components subjected to buttonholing or similar operation	Agreed statement of facts	Miami Ladies' blouses
P83/345	Watson, J. November 4, 1983	Canadian General-Tower, Ltd.	81-12-01761, etc.	Item 355.65 8% Item 355.85 7.4%	Item 771.43 5.8%, 5.6%, 5.3% or 5.1%	Agreed statement of facts	Buffalo Vinyl wall coverings
P83/346	Rao, J. November 7, 1983	Leisurecraft Products, Ltd.	82-3-00321	Item 715.05 Various rates (modules) Items 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
					Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)		
P83/347	Rao, J. November, 1983	Leisurecraft Products, Ltd.	82-3-00409	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B") plated with gold) Item 657.35 6¢ per lb. + 7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands merchandise marked "B"); entireties
P83/348	Newman, J. November 7, 1983	Federal Pacific Electric Co.	79-9-01470	Item 682.05 12.5%	Item 682.07 6%	Federal Pacific Electric Co. v. U.S., Abstract P83/226, 7/25/83	Buffalo Sensing transformers
P83/349	Newman, J. November 7, 1983	Federal Pacific Electric Co.	82-3-00350	Item 682.50 11%	Item 682.07 5.1%	Federal Pacific Electric Co. v. U.S., Abstract P83/226, 7/25/83	Detroit Sensing transformers

P83/350	Newman, J. November 7, 1983	Glasgow, Estelle V.	78-2-00415	Item 725.50 9.5%	Item 766.25 Free of duty	Agreed statement of facts	New York Music boxes
P83/351	Boe, J. November 7, 1983	Jet Sonic Corp.	81-4-00444	Item 716.10 or 716.18 Various rates (modules)	Item 688.36 5.3% Item 720.24 or 720.28 Various rates (cases) Item 740.30 or 740.34 or 740.35, Various rates (band) Item 740.30 or 740.38 Various rates (chains) Item 774.55 or 791.54 Various rates (straps)	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches entireties
P83/352	Boe, J. November 7, 1983	Jet Sonic Corp.	81-4-00446	Item 716.10 or 716.18 Various rates (modules)	Item 688.36 5.3% Item 720.24 or 720.28 Various rates (cases) Item 740.30 or 740.34 or 740.35 Various rates (bands) Item 740.30 or 740.38 Various rates (chains) Item 774.55 or 791.54 Various rates (straps)	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches entireties
P83/353	Boe, J. November 7, 1983	May Dept. Stores Int'l., Inc.	81-10-01461	Item 720.16 69¢ each + 14.8%	Item 685.24 9.9%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Los Angeles Clock porton of LED clock radios

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/354	Boe, J. November 7, 1983	RCA Corp.	81-5-00608, etc.	Item 685.20 5% (module) Item 685.19 4.8% (module) Item 685.40 5.5% (module) Item 720.18 $1.125 each + 16% (digital clock/timer) Item 715.23 $1.12 each + 17.5% (digital clock/timer)	IItem 685.19 4.8% Item 685.20 5%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	Los Angeles Portable VCR tuner/timer module
P83/355	Watson, J. November 8, 1983	Canadian General-Tower, Ltd.	82-5-00679, etc.	Item 355.65 or 355.85 8.5%, 8% or 7.4%	Item 771.43 5.8%, 5.6%, 5.3% or 5.1%	Agreed statement of facts	Detroit: Port Huron Vinyl wall coverings
P83/356	Watson, J. November 8, 1983	Canadian General-Tower, Ltd.	83-7-01021	Item 355.65 or 355.85 8.5%, 8% or 7.4%	Item 771.43 5.8%, 5.6%, 5.3% or 5.1%	Agreed statement of facts	Buffalo Vinyl wall coverings
P83/357	Boe, J. November 8, 1983	Jet Sonic Watch Corp.	81-4-00442	Item 716.10 or 716.18 Various rates (modules)	Item 688.36 5.3% Item 720.24 or 720.28 Various rates (cases) Item 740.30 or 740.34 or 740.35 Various rates (bands) Item 740.30 or 740.38 Various rates (chains) Item 774.55 or 791.54 Various rates (straps)	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

P83/358	Boe, J. November 9, 1983	Jet Sonic Watch Corp.	81-4-00429	Item 716.10 or 716.18 Various rates (modules)	Item 688.36 5.3% Item 720.24 or 720.28 Various rates (cases) Item 740.30 or 740.34 or 740.35 Various rates (bands) Item 740.30 or 740.38 Various rates (chains) Item 774.55 or 791.54 Various rates (straps)	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/359	Rao, J. November 10, 1983	Cleveland Street Togs	80-2-00301	Under item 807.00 at rate of duty applicable to item 382.33, 382.81 or 380.04 with allowance given to cost or value of some of the fabric components, the product of the U.S. and utilized in assembling the imported merchandise; no allowance made for fabric components, the product of U.S. subjected to buttonhole and/or pocket slit operations during assembly of imported garments	Components subjected to buttonhole and/or pocket slit operations during the assembly process are properly classifiable under item 807.00 and entitled to duty allowance	U.S. v. Mast Industries, Inc. No. 81-18, aff'd 12/30/81	Miami American goods returned; articles of wearing apparel assembled abroad in part of U.S. fabricated components

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/360	Rao, J. November 10, 1983	Interamerican Assemblies Inc.	80-2-00300	Under item 807.00 at rate of duty applicable to item 382.33, 382.81 or 380.84 with allowance given to cost or value of some of the fabric components, the product of the U.S. and utilized in assembling the imported merchandise; no allowance made for fabric components, the product of U.S. subjected to buttonhole and/or pocket slit operations during assembly of imported garments	Components subject to buttonhole and/or pocket slit operations during the assembly process are properly classifiable under item 807.00 and entitled to duty allowance	U.S. v. Mast Industries, Inc. No. 81-18, aff'd 12/30/81	Miami American goods returned; articles of wearing apparel assembled abroad in part of U.S. fabricated components
P83/361	Rao, J. November 10, 1983	Ozen Sound Devices, Inc.	80-10-01815, etc.	Item 737.90 16.2% Item 737.95 17.5%	Item 685.32 5.3%	Agreed statement of facts	New York Talking mechanisms
P83/362	Boe, J. November 10, 1983	Sanyo Electric Inc.	81-5-00481	Items 716.16, 716.18, 720.16, etc. Various rates ("watch or clock movements")	Item 688.36 5.3% or 5.1% Item 740.35 32.4% or 29.5% ("watchbands") Item 774.55 8.1% ("watchbands")	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	New York Solid state watches, including watch modules, watchcases and watchbands
P83/363	Watson, J. November 16, 1983	Harper-Oak Ltd.	78-8-01407, etc.	Item 807.00 Duty assessed to extent applicable under item 711.84 at rate of 7%	Item 684.30 4% except as to those parts classified under item 807.00 which are properly entitled to duty-free allowance	Harper Wyman Co. v. U.S., 1 CIT 108 (1981)	Chattanooga (New Orleans) Electric thermostats

P83/364	Watson, J. November 16, 1983	Lawrence M. Parry, Jr.	78-12-02288, etc.	Item 807.00 Duty assessed to extent applicable under item 711.84 at rate of 7%	Item 684.30 4% except as to those parts classified under item 807.00 which are properly entitled to duty-free allowance	Harper Wyman Co. v. U.S., 1 CIT 108 (1981)	Chattanooga (New Orleans) Electric thermostats
P83/365	Rao, J. November 17, 1983	F. W. Woolworth & Co.	83-6-00853	Item 379.23 40.4%	Item 379.89 20¢ per lb. + 32.1%	Agreed statement of facts	Houston Men's or boy's jogging shorts
P83/366	Watson, J. November 17, 1983	Lawrence M. Parry, Jr.	78-4-00604	Item 807.00 Duty assessed to extent applicable under item 711.84 at rate of 7%	Item 684.30 4% except as to those parts that were classified under item 807.00 which are properly entitled to duty-free allowance	Harper Wyman Co. v. U.S., 1 CIT 108 (1981)	Chattanooga (New Orleans) Electric thermostats
P83/367	Boe J. November 17, 1983	Elbe Products Corp.	82-8-01195	Item 359.50 30% + 25¢ per lb.	Item 771.42 6% Item 355.25 15% + 12¢ per lb. Item 355.82 15% + 12.5¢ per lb. Items 355.65, 774.60 and 774.55 8.5%	U.S. v. Elbe Products Corp., C.A.D. 1267	New York Synthetic leather
P83/368	Rao, J. November 18, 1983	Susan Gail Handbags, Inc.	77-8-01460, etc.	Item 656.25 Various rates	Item 745.68 Various rates	Agreed statement of facts	New York Metal handbag hardware articles
P83/369	Ford, J. November 18, 1983	Uniroyal, Inc.	80-10-01676, etc.	Items 680.12, 680.15 and 678.35 5.5%	Item 680.11 Free of duty	Converse Rubber v. U.S. (C.D. 4374)	Bridgeport (Boston); New York Shoe machinery molds
P83/370	Newman, J. November 18, 1983	Mundex Metals Corp.	78-10-01833	Item 609.86 8.5%	Item 609.82 .1¢ per lb. + 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859), aff'd, U.S. v. Philipp Overseas, Inc., C.A.D. 1263	Boston Hot rolled, annealed and pickled stainless steel angles
P83/371	Newman, J. November 18, 1983	Texas Instruments Inc.	81-6-00750, etc.	Item 685.90 8.1% or 7.7%	Item 687.58 5.8% Item 687.75 5.6%	U.S. v. Kyocera International, Inc., No. 82-6, 6/24/82	Dallas-Ft. Worth (Houston); Honolulu Lead frames

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/372	Rao, J. November 21, 1983	Niki-Lu Industries, Inc.	78-10-01819	Item 807.00 No duty allowance for domestic components which had been subject to buttonhole operation incidental to assembly operation	Item 807.00 Duty allowance for components which had been subject to buttonhole operation	U.S. v. Mast Industries, Inc., No. 81-18, 12/30/81	Miami Wearing apparel
P83/373	Boe, J. November 21, 1983	Litronix, Inc.	81-8-01048	Item 716.15 or 716.05 75¢ each	Item 688.36 5.5%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	San Francisco Watch modules
P83/374	Rao, J. November 23, 1983	Niki-Lu Industries, Inc.	78-11-01984	Item 807.00 No duty allowance for domestic components which had been subject to buttonhole operation incidental to assembly operation	Item 807.00 Duty allowance for components which had been subject to buttonhole operation	U.S. v. Mast Industries, Inc., No. 81-18, 12/30/81	Miami Wearing apparel
P83/375	Boe, J. November 23, 1983	Litronix, Inc.	81-8-00241	Items 716.10 through 716.16 Various rates	Item 688.36 5.5% (modules) Item 685.70 4% (watch displays)	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982) (modules) U.S. v. Texas Instruments, Inc., C.A.D. 1243 (watch displays)	San Francisco Watch modules and watch displays
P83/376 (amends P83/313)	Boe, J. November 30, 1983	Leisurecraft Products, Ltd.	81-8-01121	Item 715.05 (716. 14/716.18) Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% Various rates (merchandise marked "A") Item 656.25 Various rates (merchandise marked "B" plated with gold) Item 657.35 Various rates (merchandise marked "B" brass c.v.)	Agreed statement of facts	New York Electronic LCD watches, etc.

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					Item 657.25 Various rates (merchandise marked "B" steel c.v.) Item 656.20 Various rates (merchandise marked "B" palladium (white) plated cases)		
P83/377	Rao, J. December 1, 1983	Kenwood Electronics	81-11-01503	Item 678.50 4.8% Item 720.18 $1.04 each + 14.8%	Item 678.50 4.8%	Agreed statement of facts	Los Angeles Solid-state digital AM/FM timekeeping radio/cassette combinations with LED displays
P83/378	Rao, J. December 1, 1983	Williams Clarke Co., Inc.	78-10-01794	Item 202.60 8%	Item A202.60 Duty free pursuant to GSP	Agreed statement of facts	Los Angeles Malaysian hardwood laminated flooring
P83/379	Boe, J. December 5, 1983	Americana Creations	81-5-00630	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/380	Boe, J. December 5, 1983	Centro America Watch	81-9-01164	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/381	Boe, J. December 5, 1983	Jet Sonic Corp.	82-2-00241	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

P83/382	Boe, J. December 5, 1983	Jupiter Time Corp.	81-8-01057	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/383	Boe, J. December 5, 1983	Marcel Watch Corp.	81-4-00430	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/384	Boe, J. December 5, 1983	Marcel Watch Corp.	81-5-00543	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/385	Boe, J. December 5, 1983	Marcel Watch Corp.	82-2-00243	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/386	Boe, J. December 5, 1983	Sanyo Watch Corp.	81-3-00252	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

P83/387	Boe, J. December 5, 1983	World Forum Watch Ltd.	81-5-00667	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/388	Rao, J. December 6, 1983	Leisurecraft Products, Ltd.	82-1-00012	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.35 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3% or 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. + 7.5% 7.4%, 7% or 6.7% (merchandise marked "B" brass c.v.) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel c.v.) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/389	Rao, J. December 6, 1983	North American Foreign Trading Corp.	82-4-00533	Item 716.18 67¢ each or 59¢ each Item 720.02 36¢ each Item 720.14 34¢ each + 14.8% or 31¢ each + 13.6% Item 720.16 75¢ each + 16%	Item 676.20 5%, 4.8% or 4.7% (merchandise marked "A") Item A676.20 Free of duty	Agreed statement of facts	New York Clock calculators (merchandise marked "A"); clock calculators imported from Taiwan (merchandise marked "B")
P83/390	Rao, J. December 6, 1983	North American Foreign Trading Corp.	82-4-00534	Item 715.05 or 715.15 Duty on the movements under item 716.16 at rate of 75¢ each; duty on cases under 720.24 at rate of 15% + 20¢ each; duty on bands under item 740.34 at rate of 35%	Item 688.36 5.5%	Agreed statement of facts	New York Electronic watches
P83/391	Rao, J. December 6, 1983	North American Foreign Trading Corp.	82-4-00539	Item 720.34 11.9% (picture frame) Item 716.18 59¢ each (watch movements)	Item 688.36 5.1%	Agreed statement of facts	New York Picture frame desk clocks
P83/392	Newman, J. December 6, 1983	Federal Pacific Electric Co.	81-1-00066, etc.	Item 682.05 12.5%, 11.9%, 11%, 10.3% or 9.6%	Item 682.07 6%, 5.6%, 5.1% 4.7% or 4.2%	Federal Pacific Electric Company v. U.S., Abstract P83/226. 7/25/83	Buffalo-Niagara Falls Series "T", "R", or "RZ" "sensors"

P83/393	Boe, J. December 6, 1983	Centro America Watch	82-2-00231	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/394	Boe, J. December 6, 1983	Jupiter Time Co.	82-2-00229	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/395	Boe, J. December 6, 1983	Jupiter Time Co.	82-2-00238	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/396	Boe, J. December 6, 1983	Marcel Watch Corp.	82-2-00216	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (cha[illegible] item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/397	Boe, J. December 6, 1983	Marcel Watch Corp.	82-2-00230	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

P83/398	Boe, J. December 6, 1983	Marcel Watch Corp.	82-2-00239	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/399	Boe, J. December 6, 1983	North American Foreign Trading Corp.	81-1-00101-S	LCD clocks classified under item 715.15 at duty assessed on the "movements" under 720.02 at rate of 87¢ each or at rate of 67¢ Item 720.34 13.5% or 12.7% (cases)	Item 688.36 5.5% or 5.3%	Agreed statement of facts	New York LCD clocks
P83/400	Boe, J. December 6, 1983	North American Foreign Trading Corp.	81-5-00644-S	Item 720.02 36¢ each	Item A676.20 Free of duty	Agreed statement of facts	New York Model LC 465 clock calculators
P83/401	Boe, J. December 6, 1983	North American Foreign Trading Corp.	81-9-01157-S	LCD watches classified under item 715.05 with duty assessed on the "movements" under item 716.18 at rate of 67¢ each Item 720.28 9.8% + 4.8% each (cases) Item 720.24 13.9% + 18.5% each (cases) Item 740.35 32.4% (bands)	Item 688.36 5.3%	Agreed statement of facts	New York LCD watches

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/402	Boe, J. December 6, 1983	Pinkaud Import Export Co.	81-6-01059	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/403	Boe, J. December 6, 1983	Pinkaud Import Export Co.	82-2-00232	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

P83/404	Boe, J. December 6, 1983	Sanyo Electric Inc.	81-5-00491	Items 716.16, 716.18, 720.16, etc. Various rates ("watch or clock movements") Item 740.35 32.4% or 29.8% ("watchbands") Item 720.24 $.185 each + 18.9% ("watchcases")	Item 688.36 5.3%	Texas Instruments, Inc. v. U.S., 1 CIT 236 (1981), aff'd, 69 CCPA 136 (1982)	San Francisco Solid state watches
P83/405	Ford, J. December 8, 1983	Astra Trading Corp.	81-8-01092	Item 389.62 15% + 25¢ per lb.	Item 706.24 20%	J. E. Mamiye & Sons, Inc. v. U.S. (C.D. 4878)	New York Ladies' tote bags
P83/406	Boe, J. December 8, 1983	Interpur—Div. of Dart Industries, Inc.	81-10-01445	Electronic watches classified under item 715.05 at various rates	Item 688.36 5.3% or 5.1% with allowance for U.S. components under item 807.00 (merchandise) marked "A") Item 688.43 5.3% or 5.1% (merchandise marked "B")	Texas Instruments, Inc., v. U.S., C.A.D. 1244, aff'd, 69 CCPA 136 (1982) (merchandise marked "A") U.S. v. Texas Instruments, Inc., No. 81-23, 3/25/82 (merchandise marked "B")	New York Electronic watches and watch parts
P83/407	Boe, J. December 8, 1983	Wilcox International Corp.	81-11-01592	Item 720.16 69¢ each + 14.8%	Item 685.24 9.9%	Texas Instruments, Inc. v. U.S. 1, CIT 236 (1981), aff'd, 69 CCPA 136 (1982), 3/25/82	New York Solid state clock module incorporated in a clock radio
P83/408	Maletz, S.J. December 8, 1983	Pharmacia Inc.	77-8-01692	Item 799.00 5% (merchandise listed on schedule "B")	Item 437.76 Free of duty (merchandise listed on schedule "B")	Agreed statement of facts	New York Diagnostic kits and components of diagnostic kits
P83/409	Maletz, S.J. December 8, 1983	Pharmacia Inc.	80-7-01180	Item 799.00 5%	Item 437.76 Free of duty	Agreed statement of facts	New York Diagnostic kits and components of diagnostic kits
P83/410	Newman, J. December 15, 1983	Hunter Douglas, Inc.	83-4-00543	Item 338.50 10¢ per lb. + 21.6%	Item 355.82 13.9%	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg); New York Acrylic vanes

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/411	Boe, J. December 16, 1983	Formosa Plastics Group (USA) Inc.	81-7-00841	Item 355.81 6%	Item A771.42 Free of duty	U.S. v. Elbe Products Corp., C.A.D. 1267	Los Angeles Vinyl sponge leather
P83/412	Boe, J. December 16, 1983	Microma, Inc.	80-5-00826	Item 720.75 Various rates of duty including 1¢ per piece or at rate of 22.5%	Item 685.90 8.5%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	San Francisco Components of solid-state digital watches
P83/413	Rao, J. December 20, 1983	North American Foreign Trading Corp.	82-4-00530	Item 676.20 5% or 4.8% (calculating machines) Item 720.16 75¢ each + 16% or 69¢ each + 14.8% ("clock" portion)	Item 676.20 5% or 4.8%	Agreed statement of facts	New York Model LC 465 clock calculators
P83/414	Re, C.J. December 27, 1983	Kenwood Electronics	81-12-01564	Item 678.50 4.8% Item 720.18 $1.04 each + 14.8%	Item 678.50 4.8%	Agreed statement of facts	Los Angeles Solid-state digital AM/FM timekeeping radio/cassette combinations with LED displays
P83/415	Ford, J. December 27, 1983	Evans-Aristocrat Industries, Inc.	79-11-01651, etc.	Item 389.62 $.25 per lb. or 15%	Item 706.24 20%	J. E. Mamiye and Sons, Inc. v. U.S. (C.D. 4878), aff'd, 11/19/81	New York Rayon canvas ladies handbags, style No. 15470; canvas ladies handbags, style No. 5470
P83/416	Newman, J. December 27, 1983	Mitsubishi International Corp.	83-2-00199	Item 700.60 20% Appraised on basis of American selling price at the ASP values specified on entry documents	Item 700.35 8.5% Appraised on basis of export value at invoiced f.o.b. prices specified for each article	Agreed statement of facts	Los Angeles Footwear

P83/417	Boe, J. December 27, 1983	Afco Electronics, Inc.	80-5-00855	Item 720.18 $1.12 each	Item 685.24 10.4%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	San Francisco Clock modules; entireties
P83/418	Boe, J. December 27, 1983	Akai America, Ltd.	81-11-01530	Item 720.18 $1.125 each + 16%	Item 685.20 5%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	Los Angeles Solid state electronic timers
P83/419	Boe, J. December 27, 1983	Jet Sonic Corp.	81-4-00445	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands) item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/420	Boe, J. December 27, 1983	Jet Sonic Corp.	81-4-00461	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTED PROTEST DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/421	Boe, J. December 27, 1983	Jet Sonic Corp.	81-5-00566	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3%	U.S. v Texas Instruments, Inc. 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties
P83/422	Newman, J. December 30, 1983	Custom Clock, Inc.	83-3-00340	Not stated	Item 688.36 5.1% or 4.9%	Judgment on the pleadings	San Francisco Watch bracelets
P83/423	Newman, J. December 30, 1983	Federal Pacific Electric Co.	79-10-01605, etc.	Item 682.05 12.5% or 11.8%	Item 682.07 6% or 5.6%	Federal Pacific Electric Company v. U.S., abstract P83/226, 7/25/83	Buffalo Series "T", "R" or "RZ" "sensors"
P83/424	Boe, J. December 30, 1983	Jet Sonic Corp.	82-2-00242	Electronic watch entireties classified under item 715.05 with duty assessed at various rates under item 716.10 or 716.18 (modules); item 720.24 or 720.28 (cases); item 740.30, 740.34 or 740.35 (bands); item 740.30 or 740.38 (chains); item 774.55 or 791.54 (straps) as set forth in schedule "B"	Item 688.36 5.3% or 5.1%	U.S. v. Texas Instruments, Inc., 69 CCPA 136 (1982)	New York Solid state electronic digital watches; entireties

ABSTRACTS OF COURT OF INTERNATIONAL TRADE DECISIONS

ABSTRACTED REAPPRAISEMENT DECISIONS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/500	Landis, J. July 5, 1983	Topp Electronics, Inc.	79-5-00874	Constructed value	Values specified on entry papers by liquidating officer excluding one-half of amount added for assists as set forth in Schedule of Protests attached to decision and judgment	Agreed statement of facts	Miami Not stated
R83/501	Watson, J. July 5, 1983	Hayim & Co.	R60/14817, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Rugs
R83/502	Watson, J. July 5, 1983	Louis Goldey Co.	R67/8453	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Norfolk Mosaic tiles
R83/503	Re, C.J. July 18, 1983	American Import Co.	78-11-03096	Export value	Appraised values specified on entry papers by liquidating officer, less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/504	Watson, J. July 18, 1983	Lipmans Imports, Inc.	277954A	Export value	F.o.b. unit invoice prices, plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Galv. plumbing supplies
R83/505 (amends decision and judgment of March 10, 1983, R83/294)	Boe, J. July 18, 1983	Perkin Elmer Corp.	78-12-02266	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/506	Re, C.J. July 25, 1983	MRD & Associates	79-11-02089	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corps. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/507 (See R83/585 for amendment)	Re, C.J. July 25, 1983	Toshiba International Corp.	78-10-01750	Export value	Invoice unit value without addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/508	Re, C.J. July 25, 1983	Zedo Goldenberg, Inc.	75-2-00353	Export value	Invoice unit value without any addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Not stated

R83/509	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 24, 1983, Abs. R83/259)	Perkin Elmer Corp.	78-12-02104	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/510	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 23, 1983, Abs. R83/239	Perkin Elmer Corp.	78-12-02105	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/511	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 24, 1983, Abs. R83/260)	Perkin Elmer Corp.	78-12-02106	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/512	Maletz, S.J. July 25, 1983 (amends decision and judgment of Feb. 23, 1983, Abs. R83/240)	Perkin Elmer Corp.	78-12-02109	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value—said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/513	Re, C.J. July 27, 1983	Dorfman Pacific Co.	73-8-02193	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/514	Re, C.J.	East Bay Tire Co.	74-9-02660	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/515	Re, C.J. July 27, 1983	Mundo Corp.	73-7-01825	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Shower head
R83/516	Re, C.J. July 27, 1983	Rolf Gille Import Co.	73-8-02196	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/517	Re, C.J. July 28, 1983	Vandor Imports, Inc.	73-6-01345	Export value	Appraised values specified on entry papers by liquidating officer less additions to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/518	Watson, J. July 28, 1983	Rene D. Lyon Co.	257217-A, etc	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Artificial flowers
R83/519	Re, C.J. July 29, 1983	Cost Plus, Inc.	73-8-02350	Export value	Appraised values specified on entry papers by liquidating officer less additions which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

R83/520	Watson, J. July 29, 1983	B.P.M. Int'l. Ltd.	R63/6332, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, accessories and parts; entirety
R83/521	Watson, J. July 29, 1983	B.P.M. Int'l. Ltd.	R63/12754, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios, accessories and parts; entirety
R83/522	Watson, J. July 29, 1983	B.P.M Int'l. Ltd.	R65/8835, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Batteries
R83/523	Watson, J. July 29, 1983	Rene D. Lyon Co.	R58/7310, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Artificial flowers
R83/524	Re, C.J. August 1, 1983	Perkin Elmer Corp.	80-7-01041	Export value	Exporter's list prices less 35% discount	Agreed statement of facts	New York Electrical instruments and accessories
R83/525	Re, C.J. August 1, 1983	Subaru of America, Inc.	81-2-00189, etc.	Cost of production	Invoice unit values less 37%, 32%, 30%, 24%, 33% or 40%	Agreed statement of facts	Miami; San Francisco, New York Not stated
R83/526	Re, C.J. August 1, 1983	Xin Qiao Ltd.	80-9-01856	Export value	Invoice value	Agreed statement of facts	Los Angeles "Kung Fu" shoes
R83/527	Re, C.J. August 1, 1983	Zado Goldenberg, Inc.	76-6-01853	Export value	Invoice unit value without addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/528	Re, C.J. August 2, 1983	Allied International, Inc.	81-3-00250	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Hardboard Chicago

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/529	Re, C.J. August 2, 1983	Allied International, Inc.	82-9-01252	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Hardboard Wilmington
R83/530	Re, C.J. August 2, 1983	Banton Corp.	73-7-01644	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Seattle; San Francisco Not stated
R83/531	Re. C.J. August 2, 1983	Hamilton Industries	73-3-00779	Export value	Appraised values specified on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/532	Re, C.J. August 2, 1983	Russ Togs, Inc.	73-6-01456, etc.	Export value	Appraised unit values specified on entry papers by appraising customs officer less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/533	Re, C.J. August 2, 1983	Topp Electronics, Inc.	81-8-01029	Constructed value	Values specified on entry papers by liquidating officer excluding one-half of amount added for assists as set forth in attached schedule of protests	Agreed statement of facts	Los Angeles; San Juan Not stated

R83/534	Re, C.J. August 2, 1983	Treeco Sales Corp.	74-7-01773	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Portland Not stated
R83/535	Re, C.J. August 3, 1983	Allied International, Inc.	82-9-01253	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	New Orleans Hardboard
R83/536	Re, C.J. August 8, 1983	BBC Imports, Inc.	80-11-00045	Export value	Invoice unit value	Agreed statement of facts	Los Angeles Ladies' slippers
R83/537	Re, C.J. August 8, 1983	Amerex Trading Corp.	81-1-00097	Export value	Appraised values shown on entry papers less additions into reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Newark Not stated
R83/538	Re, C.J. August 8, 1983	Inter-Pacific Corp.	80-1-00195	Export value	Invoiced unit prices less nondutiable charges included	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Beachcomber footwear
R83/539	Re, C.J. August 8, 1983	Perkin Elmer Corp.	78-11-02041	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value. Prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/540	Watson, J. August 9, 1983	F. B. Vandegrift & Co.	218604A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Philadelphia Wool and nylon rugs
R83/541	Watson, J. August 9, 1983	Maher-App & Co.	229498A, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	New Orleans Rugs

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/542	Re, C.J. August 11, 1983	Mitsui & Co. (USA), Inc.	82-1-00034	Transaction value	Invoice unit prices of merchandise for exportation from Japan to U.S., less included non-dutiable charges for ocean freight and marine insurance	Agreed statements of facts	Philadelphia Steel mill products
R83/543	Re, C.J. August 11, 1983	Mitsui & Co. (USA), Inc.	82-3-00276	Transaction value	Invoice unit prices of merchandise for exportation from Japan to U.S., less included non-dutiable charges for ocean freight and marine insurance	Agreed statements of facts	New York Steel mill products
R83/544	Re, C.J. August 11, 1983	Mitsui & Co. (USA), Inc.	82-3-00284	Transaction value	Invoice unit prices of merchandise for exportation from Japan to U.S., less included non-dutiable charges for ocean freight and marine insurance	Agreed statements of facts	New Orleans Steel mill products
R83/545	Re, C.J. August 16, 1983	Allied Stores, Int'l. Inc.	79-6-00986	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Import Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/546	Re, C.J. August 16, 1983	American Fencers Supply	73-2-00538	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Fencing equipment

R83/547	Re, C.J. August 16, 1983	H.G. Toys, Inc.	82-9-01285	Transaction value	Values equivalent to U.S. dollar prices converted to Hong Kong dollars at fixed rate set forth on commercial invoices and reconverted to U.S. dollars at official rate of exchange in effect on date of export	Agreed statement of facts	New York Toys
R83/548	Re, C.J. August 16, 1983	Mitsui & Co. (USA), Inc.	82-3-00280	Transaction value	Invoice unit prices less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	New York L-Cysteine Mono Hydrochlo Monohydrate
R83/549	Re, C.J. August 16, 1983	Mitsui & Co. (USA), Inc.	82-3-00281	Transaction value	Invoice unit prices of merchandise less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	New York Steel mill products
R83/550	Re, C.J. August 16, 1983	Mitsui & Co. (USA), Inc.	82-3-00285	Transaction value	Invoice unit prices of merchandise less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	New Orleans Steel mill products
R83/551	Re, C.J. August 16, 1983	Mitsui & Co. (USA), Inc.	82-3-00286	Transaction value	Invoice unit prices of merchandise less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	New Orleans Steel mill products
R83/552	Re, C.J. August 16, 1983	Nichimen Co., Inc.	79-6-00990	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Not stated
R83/553	Re, C.J. August 18, 1983	Mitsui & Co. (USA), Inc.	82-1-00033	Transaction value	Invoice unit prices less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/554	Re, C.J. August 18, 1983	Mitsui & Co. (USA), Inc.	82-1-00036	Transaction value	Invoice unit prices less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products
R83/555	Re, C.J. August 18, 1983	Mitsui & Co. (USA), Inc.	82-3-00283	Transaction value	Invoice unit prices less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products
R83/556	Re, C.J. August 18, 1983	Mitsui & Co. (USA), Inc.	82-3-00361	Transaction value	Invoice unit prices less included non-dutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products
R83/557	Watson, J. August 18, 1983	Compass Instrument & Optical Co.	R60/2082	Transaction value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars, etc.
R83/558	Watson, J. August 18, 1983	Haruta & Co.	R62/11107, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Dinnerware and tableware
R83/559	Watson, J. August 18, 1983	Hayim & Co.	R59/12254, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs
R83/560	Watson, J. August 18, 1983	Hayim & Co.	R60/12107, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs, cotton rugs, dinnerware

R83/561	Watson, J. August 18, 1983	Imported Rug Associates, Ltd.	R63/2437	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Houston Rugs
R83/562	Re, C.J. August 19, 1983	Mitsui & Co. (USA), Inc.	82-1-00098	Transaction value	Invoice unit prices less included nondutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products
R83/563	Re, C.J. August 19, 1983	Mitsui & Co. (USA), Inc.	82-3-00277	Transaction value	Invoice unit prices less included nondutiable charges for ocean freight and marine insurance	Agreed statement of facts	New York Steel mill products
R83/564	Re, C.J. August 19, 1983	Mitsui & Co. (USA), Inc.	82-3-00287	Transaction value	Invoice unit prices less included nondutiable charges for ocean freight and marine insurance	Agreed statement of facts	New Orleans Steel mill products
R83/565	Watson, J. August 19, 1983	American Roland Corp.	249800A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Tuna in cans, flatware, batteries, thermometers
R83/566	Watson, J. August 19, 1983	C. Itoh & Co. (America), Inc.	R58/24571	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool woven fabric, etc.
R83/567	Watson, J. August 19, 1983	C. Itoh & Co. (America), Inc.	R59/969, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Textiles
R83/568	Watson, J. August 19, 1983	Haruta & Co.	R59/16081, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Tableware/dinnerware
R83/569	Watson, J. August 19, 1983	Haruta & Co.	R62/1773, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tableware/dinnerware

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/570	Watson, J. August 19, 1983	Hayim & Co.	249891A, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool hooked rugs, etc.
R83/571	Watson, J. August 19, 1983	Hayim & Co.	R59/6594, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tubular rugs/mats, etc.
R83/572	Watson, J. August 19, 1983	Hayim & Co.	R59/6595, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool hooked and tubular rugs
R83/573	Watson, J. August 19, 1983	Imported Rug Associates, Ltd.	R65/21958, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Rugs
R83/574	Watson, J. August 19, 1983	Linmark International Corp.	R59/9084, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios, accessories and parts; entireties
R83/575	Watson, J. August 19, 1983	Lipmans Imports, Inc.	241378A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Pipe fittings
R83/576	Watson, J. August 19, 1983	Nichimen	R59/10715, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Los Angeles Rayon fabric and cotton articles
R83/577	Re, C.J. August 24, 1983	Brown Boveri Corp.	77-12-04825	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated

R83/578	Re, C.J. August 24, 1983	Marshall Field & Co.	75-2-00428, etc.	Export value	Appraised values specified on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/579	Re, C.J. August 24, 1983	Mitsubishi International Corp.	76-12-02704, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/580	Re, C.J. August 24, 1983	Mitsubishi International Corp.	82-4-00485	Export value	Invoice unit prices shown on commercial invoices accompanying entry papers	Agreed statement of facts	Chicago Wire-cut electric discharge machine systems
R83/581	Re, C.J. August 24, 1983	Mitsui & Co. (USA), Inc.	82-1-00035	Transaction value	Invoice unit prices less included nondutiable charges for ocean freight and marine insurance	Agreed statement of facts	Philadelphia Steel mill products
R83/582	Re, C.J. August 24, 1983	Nichimen Co., Inc.	79-7-01078	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Not stated
R83/583	Re, C.J. August 24, 1983	Starlight Trading, Inc.	76-8-01787, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/584	Re, C.J. August 24, 1983	Starlight Trading, Inc.	76-11-02445	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/585	Re, C.J. August 24, 1983 (amends decision and judgment of 7/25/83 Abs. R83/507)	Toshiba International Corp.	78-10-01750	Export value	Invoice unit prices as adjusted to resale price without addition for currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/586	Re, C.J. August 26, 1983	Continental Scarf Corp	76-12-02696, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/587	Watson, J. August 26, 1983	Haruta & Co.	R62/1796, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tableware/dinnerware
R83/588	Watson, J. August 26, 1983	Haruta & Co.	R62/14888, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tableware/dinnerware
R83/589	Watson, J. August 26, 1983	Hayim & Co.	R60/2897, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs
R83/590	Watson, J. August 26, 1983	Imported Rug Associates Ltd.	R64/6457, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Boston Rugs
R83/591	Watson, J. August 26, 1983	Imported Rug Associates, Ltd.	R66/4597, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Francisco Rugs
R83/592	Watson, J. August 26, 1983	Intermaritime Forwarding Co.	268326A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Not stated
R83/593	Re, C.J. August 30, 1983	Chori America, Inc.	82-3-00396	Export value	Value calculated in accordance with C.I.E. 38/81 or 10/18/81, and C.I.E. 30/81 of 7/20/81	Agreed statement of facts	Honolulu Polyester fabrics and/or yarns

R83/594	Re, C.J. August 30, 1983	Mast Industries	81-11-01538	Constructed value	Invoice unit values	Agreed statement of facts	New York Wearing apparel
R83/595	Watson, J. August 30, 1983	A & A Trading Corp.	R60/124, etc.	Export value (merchandise marked "A" and "B")	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values (merchandise marked "A") Appraised values shown on entry papers less amounts attributable to buying commission (merchandise marked "B")	Agreed statement of facts	Boston Transistor radios, accessories and parts; entireties (merchandise marked "A") All merchandise except transistor radios described on schedule A (merchandise marked "B")
R83/596	Watson, J. August 30, 1983	Haruta & Co.	R58/27985, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statenent of facts	New York Tableware/dinnerware
R83/597	Watson, J. August 30, 1983	Haruta & Co.	R60/17440, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Table/dinnerware
R83/598	Watson, J. August 30, 1983	Haruta & Co.	R62/8620, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tableware/dinnerware and thermometers
R83/599	Watson, J. August 30, 1983	Haruta & Co.	R62/10624, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Tableware and dinnerware and tuna fish
R83/600	Watson, J. August 30, 1983	James Betesh Import Co.	R58/3728, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Flatware, binoculars, cotton rugs, etc.
R83/601	Re, C.J. September 6, 1983	Mitsubishi International Corp.	82-10-01376	Export value	Dutiable at value calculated in accordance with C.I.E. 38/81 of 10/18/81, and C.I.E. 30/81 of 7/20/81	Agreed statement of facts	New York Polyester fabrics and/or yarns

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/602	Re, C.J. September 7, 1983	J.C. Penney Purchasing Corp.	81-8-01114	American selling price	Appraised at $7.00 per pair, less 2% net packed	Agreed statement of facts	Norfolk Men's and boys' nylon and vinyl suede jogger oxfords
R83/603	Re, C.J. September 7, 1983	Perkin Elmer Corp.	80-7-01040	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/604	Re, C.J. September 7, 1983	Perkin Elmer Corp.	80-7-01043	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/605	Re, C.J. September 7, 1983	Perkin Elmer Corp.	80-10-01863	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories

R83/606	Re, C.J. September 7, 1983	Perkin Elmer Corp.	80-10-01864	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/607	Re, C.J. September 7, 1983	Perkin Elmer Corp.	80-10-01865	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/608	Re, C.J. September 7, 1983	Perkin Elmer Corp.	81-5-00625	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/609	Re, C.J. September 7, 1983	Perkin Elmer Corp.	81-5-00626	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/610	Re, C.J. September 7, 1983	Perkin Elmer Corp.	81-10-01381	Export value	Invoice unit prices, net, packed or invoice unit prices plus percentages or additions for packing representing the correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/611	Watson, J. September 13, 1983	Allied International, Inc.	81-9-01279	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Jacksonville; Los Angeles Not stated
R83/612	Watson, J. September 13, 1983	Allied International, Inc.	81-11-01504	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Boston Not stated
R83/613	Watson, J. September 13, 1983	Perkin Elmer Corp.	80-9-01519	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories

R83/614	Watson, J. September 13, 1983	Perkin Elmer Corp.	80-10-01862	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/615	Re, C.J. September 14, 1983	Mitsui & Co. (USA), Inc.	75-1-00195	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/616	Re, C.J. September 15, 1983	B & H Importing Corp.	78-8-01416	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/617	Re, C.J. September 15, 1983	Mitsui & Co., (USA), Inc.	73-10-02993, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Boston Not stated
R83/618	Re, C.J. September 15 1983	Mitsui & Co. Inc.	73-11-03187, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/619	Re, C.J. September 15, 1983	Starlight Trading Inc.	77-11-04573, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/620	Re, C.J. September 19, 1983	Mitsui & Co. (USA), Inc.	73-3-00755, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New Orleans Not stated
R83/621	Re, C.J. September 19, 1983	Mitsui & Co. (USA), Inc.	75-9-02340 etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Wilmington Not stated

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/622	Watson, J. September 19, 1983	Allied International, Inc.	82-4-00441S	Cost of production	Invoice unit values plus agent's commission shown on entry papers not including additions for domestic insurance, inland freight, port expenses, and extra war risk insurance	Agreed statement of facts	Boston Hardboard
R83/623	Watson, J. September 19, 1983	Perkin Elmer Corp.	80-7-01042	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable value. Said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/624	Re, C.J. September 20, 1983	Mitsui & Co. (USA), Inc.	75-10-02586	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Detroit Not stated
R83/625	Re, C.J. September 20, 1983	Mitsui & Co. (USA), Inc.	76-10-02387	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/626	Re, C.J. September 20, 1983	Mitsui & Co. (USA), Inc.	78-4-00612, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Boston Not stated
R83/627	Re, C.J. September 20, 1983	Mitsui & Co. (USA), Inc.	79-8-01275	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Philadelphia Not stated

R83/628	Re, C.J. September 20, 1983	Starlight Trading Inc.	79-8-01277	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/629	Watson, J. September 20, 1983	Leslie Kleyman Corp.	R59/14415, etc.	United States value	Said dutiable values per lb. specified on attached schedule in column designated "Dutiable Value"	Agreed statement of facts	New York Thiourea
R83/630	Watson, J September 20, 1983	Mitsui & Co. (USA), Inc.	81-11-01511	Transaction value	Invoice unit prices less included nondutiable charges for ocean freight and marine insurance	Agreed statement of facts	New York, Steel mill products
R83/631	Watson, J. September 21, 1983	International Chemical Corp.	R61/11867, etc.	United States value	Said dutiable values per lb. on attached schedule in column designated "Dutiable Value"	Agreed statement of facts	New York Thiourea
R83/632	Watson, J. September 21, 1983	International Chemical Corp.	R61/19884, etc.	United States value	Said dutiable values per lb. on attached schedule in column designated "Dutiable Value"	Agreed statement of facts	Los Angeles Thiourea
R83/633	Watson, J. September 21, 1983	International Chemical Corp.	R64/4011	United States value	Said dutiable values per lb. on attached schedule in column designated "Dutiable Value"	Agreed statement of facts	Houston Thiourea
R83/634	Watson, J. September 23, 1983	Titanium Pigments	82-9-01202	United States value	F.o.b. invoice values	Agreed statement of facts	Los Angeles Titanium dioxide pigments
R83/635	Watson, J. October 3, 1983	Leyden Customs Expediters, Inc.	R61/1788, etc.	United States value	Said dutiable values per lb. specified on attached schedule in column designated "Dutiable Value"	Agreed statement of facts	New York Thiourea
R83/636	Watson, J. October 3, 1983	Yu, Ka S.	81-7-00899S	Export value	F.o.b. invoice unit value of $1.19 per pair, net packed, f.o.b. Hong Kong as set forth in agreed statement of facts	Agreed statement of facts	Los Angeles Cotton shoes, Item No. 7164B

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/637	Re, C.J. October 5, 1983	Alfar Imports Ltd.	76-5-01092, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/638	Re, C.J. October 5, 1983	C. Itoh & Co. (America) Inc.	73-3-00810	Export value (entries listed on attached schedule with suffix "A") United States value (entries listed on attached schedule with suffixes "D" and "E")	Appraised values shown on entry papers less additions included to reflect currency revaluation (entries listed on attached schedule with suffix "A") Landed paid prices less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided that said deductions do not result in an appraised value below f.o.b. invoiced values, less additions included to reflect currency revaluation (entries listed on attached schedule with suffix "A") Landed duty paid price less statutory deductions for general expenses and profit in an amount of 11.72% thereof less freight, insurance and duty, provided that said deductions do not result in an appraised value below f.o.b. invoice values	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated

R83/639	Re, C.J. October 5, 1983	Macy's of California	73-7-01992	Export value	Appraised values specified on entry papers by liquidating officer, less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/640	Re, C.J. October 5, 1983	Mitsui & Co. (U.S.A.), Inc.	73-3-00637, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Houston; Mobile Not stated
R83/641	Watson, J. October 5, 1983	First Chemical Products, Inc.	74-10-02834, etc.	American selling price	$6.90 per kilogram	Agreed statement of facts	New York Sulfamethazine, U.S.P. grade
R83/642	Watson, J. October 5, 1983	New York Merchandise Co.	R60/10342, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Diego Tube and tubular rugs
R83/643	Boe, J. October 12, 1983	Carlyle Footwear	79-8-01240	American selling price	Appraised values less 23%, per pair	Agreed statement of facts	New York Footwear
R83/644	Boe, J. October 12, 1983	Carlyle Footwear	80-12-00179	American selling price	Appraised values less 23%, per pair	Agreed statement of facts	Seattle Footwear
R83/645	Watson, J. October 13, 1983	Compass Instrument & Optical Co.	R59/18364, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R83/646	Watson, J. October 13, 1983	Lipmans Imports Inc.	241912A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Pipe fittings
R83/647	Watson, J. October 14, 1983	Hayim & Co.	256807A, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Cotton hooked rugs, pipe fittings

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/648	Watson, J. October 14, 1983	Hayim & Co.	R60/846, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs
R83/649	Watson, J. October 14, 1983	Hayim & Co.	R60/17092	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs
R83/650	Watson, J. October 14, 1983	Hayim & Co.	R60/18817, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool rugs
R83/651	Watson, J. October 14, 1983	Hayim & Co.	R61/3604, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Rugs/mats
R83/652	Watson, J. October 14, 1983	Hayim & Co.	R64/17769	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	Seattle Wool hooked rugs and tubular mats
R83/653	Watson, J. October 14, 1983	Imported Rug Associates Ltd.	R66/22499, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Seattle Wool hooked rugs and tubular mats
R83/654	Watson, J. October 14, 1983	J. C. Penney	R61/23837	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Norfolk Sweaters
R83/655	Watson, J. October 14, 1983	Kanematsu New York Inc.	R61/5164, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Wool and silk fabric
R83/656	Watson, J. October 14, 1983	Mitsubishi International Corp.	R60/19138, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Textiles

R83/657	Re, C.J. October 17, 1983	Mitsui & Co. (USA), Inc.	73-12-03335	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v U.S. (C.D. 4739)	New York; San Francisco Not stated
R83/658	Re, C.J. October 17, 1983	Spiegel, Inc.	73-8-02435, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currrency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/659	Re, C.J. October 17, 1983	Zayre Corp.	73-11-03257	Export value	Appraised values, less amounts added for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles; Boston; New York; Miami; Chicago Not stated
R83/660	Re, C.J. October 17, 1983	Zayre Corp.	75-8-02045	Export value	Appraised values, less amounts added for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles; New York Not stated
R83/661	Landis, J. October 17, 1983	N. L. Industries, Inc.	83-7-01055	United States value	F.o.b. invoice values	Agreed statement of facts	Los Angeles Titanium dioxide pigments
R83/662	Watson, J. October 17, 1983	Shalom & Co.	272800A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Hooked rugs
R83/663	Watson, J. October 18, 1983	Cohn Hall Marx	R58/24826, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Silk fabric
R83/664	Watson, J. October 18, 1983	Compass Instrument & Optical Co.	R59/11171, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R83/665	Watson, J. October 18, 1983	Compass Instrument & Optical Co.	R59/11902	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, accessories and parts; entireties

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/666	Watson, J. October 18, 1983	Compass Instruments & Optical Co.	R60/14103, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R83/667	Watson, J. October 18, 1983	Empire Findings Co.	R61/14213, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Thermometers
R83/668	Watson, J. October 18, 1983	Gunze N.Y. Inc.	R59/15883, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk piece goods and silk & rayon mixed goods
R83/669	Watson, J. October 18, 1983	Nipkow & Kobelt Inc.	299721A, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Silk fabric
R83/670	Watson, J. October 18, 1983	Nipkow & Kobelt Inc.	R58/5378, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Rayon mixed silk fabric and silk fabric
R83/671	Watson, J. October 18, 1983	Nipkow & Kobelt Inc.	R59/5282, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk and rayon mixed silk fabric
R83/672	Watson, J. October 18, 1983	Nipkow & Kobelt Inc.	R59/9202, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk fabric

R83/673	Watson, J. October 18, 1983	Oriental Exporters, Inc.	R63/728, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Transistor radios with accessories and parts; entireties
R83/674	Watson, J. October 18, 1983	Siber Hegner Co.	286927A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk piece goods
R83/675	Watson, J. October 19, 1983	Berkshire Handkerchief Co.	R60/16192	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York Transistor radios with accessories and parts; entireties
R83/676	Watson, J. October 19, 1983	Cohn Hall Marx	R59/8707, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Los Angeles Silk fabric
R83/677	Watson, J. October 19, 1983	Cohn Hall Marx	R59/10936, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Silk piece goods
R83/678	Watson, J. October 19, 1983	Lipmans Imports, Inc.	241911A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Plugs, bushings, flanges, etc.
R83/679	Re, C.J. October 24, 1983	American NTN Bearing Manufacturing Corp.	78-1-00164	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/680	Re, C.J. October 24, 1983	Chori America Inc.	73-12-03366, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York; Los Angeles Not stated
R83/681	Re, C.J. October 24, 1983	Holly Stores Inc.	76-3-00757	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/682	Re, C.J. October 24, 1983	Inter Pacific Corp.	74-10-02823 75-12-03262	Export value	Invoiced unit prices less non-dutiable charges (if any) included therein	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Footwear and wearing apparel
R83/683	Re, C.J. October 24, 1983	Marubeni America Corp.	77-12-04971	Export value	Unit values found by appraising customs official, less ocean freight and marine insurance without additions for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Electronic flash units
R83/684	Re, C.J. October 24, 1983	Nichimen Co.	76-1-00268	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Not stated
R83/685	Landis, J. October 24, 1983	Japan Merchandise Co.	R59/321, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Cigarette lighters
R83/686	Re, C.J. October 25, 1983	Mitsubishi International Corp.	74-6-01480, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/687 (amends R83/34)	Watson, J. October 26, 1983	Brother International Corp.	R65/10569, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values (items shown on schedule "A") Appraised unit values less 7.5% thereof, net packed (items shown on schedule "B")	Agreed statement of facts	Longview (Portland, Oreg.) Wood consoles (items shown on schedule "A") Sewing machines w/motor, etc. (items shown on schedule "B")

R83/688	Re, C.J. October 27, 1983	Jantzen Inc.	73-5-01176	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Longview (Seattle) Clothes and textile
R83/689	Re, C.J. October 27, 1983	S. S. Kresge Co.	73-11-08188	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Savannah Wearing apparel
R83/690	Re, C.J. October 27, 1983	United Merchants & Mfrs. Inc.	74-9-02436	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Charleston Wearing apparel, etc.
R83/691	Re, C.J. October 27, 1983	Vanetta Fabrics Corp.	78-7-01336, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/692	Re, C.J. October 27, 1983	Washington Quilt Co.	73-6-01544	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Seattle Sleeping bags, etc.
R83/693	Landis, J. October 27, 1983	Amjet Industries Inc.	82-7-00990	Constructed value	Appraised values except $.04396 per pair used as figure for transportation of U.S. components from point of export to assembler's in lieu of transportation figure used by customs in calculating appraised values	Agreed statement of facts	San Juan Footwear uppers
R83/694	Landis, J. October 27, 1983	B & K Machinery	82-7-00980	Transaction value deductive value for (entry 404080 of 12/2/80)	Invoiced prices less any statutorily nondutiable charges (all entries)	Agreed statement of facts	Buffalo Machinery

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/695	Landis, J. October 27, 1983	Perkin Elmer Corp.	80-9-01520	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable values; said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electrical instruments and accessories
R83/696	Landis, J. October 27, 1983	RCA Picture Tube Division	80-9-01482	Cost of production	Invoice unit values less any non-dutiable charges included therein	Agreed statement of facts	Laredo (Houston) Color picture tube mounts
R83/697	Watson, J. November 3, 1983	A & A Trading Corp.	R59/17038, etc.	Export value	Appraised values shown on entry papers less amounts attributable to buying commission	Agreed statement of facts	New York Various electrical articles
R83/698	Watson, J. November 3, 1983	Brother International Corp.	R64/18441, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New Orleans Sewing machine heads
R83/699	Watson, J. November 3, 1983	Hayim & Co.	252173A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton and wool hooked rugs and pipe fittings
R83/700	Watson, J. November 3, 1983	Hayim & Co.	R61/3398, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs and mats
R83/701	Watson, J. November 3, 1983	Iwai New York Inc.	R60/5735, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Woolen sweaters

R83/702	Watson, J. November 3, 1983	Iwai New York Inc.	R62/8177, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values (schedule A) Appraised unit values less 7.5% thereof, net packed (schedule B)	Agreed statement of facts	New York Transistor radios with accessories and parts; entireties (Schedules A and B)
R83/703	Re, C.J. November 4, 1983	Sanyo Electric Inc.	73-10-02925, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R83/704	Re, C.J. November 7, 1983	C. Itoh & Co. (America) Inc.	74-1-00248, etc.	Export value (merchandise marked "A") United States value (merchandise marked "D" and "E")	Appraised values shown on entry papers less additions included to reflect currency revaluation (merchandise marked "A") Landed duty paid price less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided said deductions do not result in appraised value below f.o.b. invoiced values less additions included to reflect currency revaluation (merchandise marked "D") Landed duty paid price less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided that deductions do not result in appraised value below f.o.b. invoice values (merchandise marked "E")	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/705	Re, C.J. November 7, 1983	YKK Zipper (USA), Inc.	80-10-01712	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/706	Re, C.J. November 8, 1983	C. Itoh & Co. (America) Inc.	73-2-00346, etc.	Export value (merchandise marked "A") United States value (merchandise marked "D")	Appraised values shown on entry papers less additions included to reflect currency revaluation (merchandise marked "A") Landed duty paid price less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided deductions do not result in an appraised value below f.o.b. invoiced values less additions included to reflect currency revaluation (merchandise marked "D")	C.B.S. Imports corp. v. U.S. (C.D. 4739) (merchandise marked "A") Agreed statement of facts (merchandise marked "D")	New York Not stated (merchandise marked "A"); synthetic textiles (merchandise marked "D")
R83/707	Watson, J. November 8, 1983	Gunze New York Inc.	R59/13693, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Silk piece goods, etc.
R83/708	Watson, J. November 8, 1983	Merco Textile Co., Inc.	R58/11052, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Hooked and tube rugs

R83/709	Watson, J. November 9, 1983	Shalom & Co.	R63/14754, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, accessories and parts; entirety
R83/710	Rao, J. November 10, 1983	Grolier Inc.	81-2-00148	Constructed value	All payments of royalties, including royalty advances and royalty guarantees excluded from appraisal value of merchandise	Agreed statement of facts	New York Film negatives on entry Nos. K356559, K189294, K431199 and K355525
R83/711	Re, C.J. November 18, 1983	C. Itoh & Co. (America) Inc.	77-8-01959, etc.	Export value (entries listed on attached schedule with suffix "A") United States (entries listed on attached schedule with suffixes "D" and "E")	Appraised values shown on entry papers less additions included to reflect currency revaluation (entries listed with suffix "A") Landed duty paid price less statutory deductions for general expenses and profit in an amount of 11.72% thereof less freight, insurance and duty, provided that said deductions do not result in an appraised value below f.o.b. invoiced values, less additions included to reflect currency revaluation (entries listed with suffix "D") Landed duty paid price less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided said deductions do not result in an appraised value below f.o.b. invoice values (entries listed with suffix "E")	C.B.S. Imports Corp v. U.S. (C.D. 4739) (entries listed with suffix "A") Agreed statement of facts (entries listed with suffixes "D" and "E")	New York Not stated (entries listed with suffix "A") Synthetic textiles (entries listed suffixes "D" and "E")

ABSTRACTED REAPPRAISEMENT DECISIONS—Continued

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/712	Re, C.J. November 18, 1983	Haruta & Co.	79-3-00550	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/713	Re, C.J. November 18, 1983	World Famous Sales Co.	73-8-02434	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago; New York Not stated
R83/714	Landis, J. November 23, 1983	Holly Stores, Inc.	76-4-00978	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/715	Landis, J. November 23, 1983	Petrie Stores Corp.	75-11-02816	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/716	Landis, J. November 23, 1983	Regal Accessories, Inc.	77-11-04778	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/717	Landis, J. November 23, 1983	Regal of California, Inc.	77-12-04842	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Wearing apparel
R83/718	Rao, J. December 5, 1983	F. W. Myers & Co.	83-7-00950	American selling price	$.25 each less brokerage and included customs duties	Judgment on the pleadings	Buffalo Bicycle tire sealers and inflators
R83/719	Rao, J. December 6, 1983	Meldisco	82-5-00657	American selling price	61% of selling price of shell and liner	Agreed to statement of facts	Seattle Footwear shells

R83/720	Watson, J. December 6, 1983	Stone & Downer	R60/17276, etc.	Export value	F.o.b. unit prices shown in entry documents plus 20% of difference between f.o.b. unit prices and appraised values, net packed	Agreed statement of facts	Boston Binoculars
R83/721	Watson, J. December 6, 1983	Sun Coast Merchandise Corp.	R59/16368, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Binoculars
R83/722	Watson, J., December 6, 1983	The Akron	288394-A, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Binoculars
R83/723	Re, C.J. December 15, 1983	Starlight Trading, Inc.	77-2-00163	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/724	Watson, J. December 15, 1983	Hayim & Co.	R61/14501, etc.	Export value	F.o.b. unit invoice prices less 7.5% thereof	Agreed statement of facts	New York Wool and cotton rugs
R83/725	Watson, J. December 15, 1983	Nissho-American Corp.	R59/19421, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton clothing
R83/726	Watson, J. December 15, 1983	Nissho-American Corp.	R60/229, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Cotton clothing and wool sweaters
R83/727	Re, C.J. December 19, 1983	Armbee Corp.	75-01-00238	Export value	Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Rubber bands

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R83/728	Re, C.J. December 19, 1983	B & B Importing Co.	73-2-00537	Export value	Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Auto tape players, etc.
R83/729	Re, C.J. December 19, 1983	D. B. Berleson & Co.	73-7-01725	Export value	Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Portland, Oreg. Not stated
R83/730	Newman, J. December 19, 1983	China Mercantile Co.	82-3-00399	Export value	Invoice unit price as entered	Agreed statement of facts	Los Angeles Footwear style Nos. JB 408 and JB 401
R83/731	Re, C.J. December 27, 1983	Garrett-Hewitt Int'l., Inc.	73-7-02082	Export value	Appraised values specified on entry papers by liquidating officer, less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/732	Newman, J. December 27, 1983	GAF Corp.	82-1-00105	Export value	Invoiced unit values and the total dutiable value of merchandise is $87,116.60	Agreed statement of facts	Portland (Oreg.) Sound movie projectors and spare parts
R83/733	Re, C.J. December 30, 1983	Metasco, Inc.	75-5-01068	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated

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